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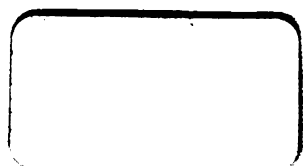
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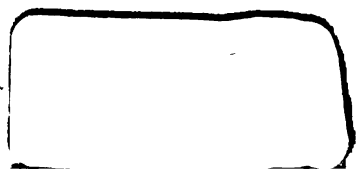
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THE
Lehigh (County) Law
Journal

CONTAINING

Cases Decided

IN THE

Several Courts of Lehigh County

AND IN OTHER COURTS.

REPORTED BY

Charles W. Kaepfel and Calvin E. Arner

Members of the Lehigh County Bar

VOL. VII.

CALL PUBLISHING CO., ALLENTOWN, PA.
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VOLUME VII.

FLICKINGER v. FLICKINGER.

Divorce—Alimony and Counsel Fees.

In a proceeding in divorce, the husband will not be required to pay to his wife for the support and maintenance of the children, especially when the husband is willing to take care of the children, and the wife refuses to give them up. Much less will an order be made on the husband to pay arrearages for support of children on his prior agreement in a proceeding for support.

Reasonable alimony and a counsel fee fixed.

In the Court of Common Pleas of Lehigh County. Leon L. Flickinger v. Laura L. Flickinger. No. 61 April Term, 1914. In Divorce. Rule for Alimony and a Counsel Fee.

James L. Schaadt, for Rules.

W. LaMonte Gillette and Samuel J. Kistler, Contra.

Groman, P. J., February 21, 1916. The libel in this proceeding in divorce charges desertion; the subpoena was allowed February 16, 1914; service had upon the respondent October 14, 1915; a petition for alimony in a sum equal to the arrears due for the support of two children, and counsel fees was presented; a rule allowed and an answer to the rule filed. It appears the parties were married on March 25, 1906, and lived together as husband and wife until October 4th, 1912. They have two children—a daughter nine years old and a son eight years old. The respondent had the libellant arrested for support, the case was returned to the Quarter Sessions of Lehigh County as of No. 43 October Sessions, 1912; on November 2, 1912, a nol pros. was entered, the defendant agreeing to pay the sum of Five (\$5) Dollars per week; payment for some reason or other was later on discon-

tinned; the amount claimed as due for support of the children is Three Hundred and Sixty (\$360.00) Dollars. The libellant earns Eighty (\$80.00) Dollars a month and is willing to take the children, but the wife refuses to deliver them to the libellant.

On a rule pendente lite, the Court will not compel the husband to pay his wife anything for the support and maintenance of the children especially when the husband is willing to take care of the children and the wife refuses to give them up: *Bloom v. Bloom*, 17 Pa. County Court Reports, Page 478, much less would the Court make an order compelling the husband to pay arrearages for support of the children on demand for alimony. The question before us requiring consideration is the allowance of alimony and counsel fees; in *Fernald v. Fernald*, 41 Weekly Notes of Cases, Page 214, Judge Rice speaking for the Superior Court laid down the rule to be: "that a husband, who is libellant in a divorce case, may be required to pay the proper expenses of his wife in the conduct of her defence: what expenses shall be paid will depend upon the circumstances of the particular case, and their allowance is within the sound discretion of the court having jurisdiction of the divorce proceeding, regard being had to the husband's ability and the wife's necessity."

On the hearing of a rule for alimony and counsel fees the court will not consider evidence tending to prove the allegations contained in the libel and answer thereto: *Kline v. Kline*, 1 Phila., Page 383; *Downing v. Downing*, 7 Kulp, Page 138. The wife must subsist and is entitled to funds necessary for the vindication of her rights, and for which purpose alimony and counsel fees are allowed by the court; the amount is entirely within the discretion of the court: *Graves v. Cole*, 19 Pa. St., Page 171; *Banes v. Banes*, 3 Brewster, Page 612; *Breinig v. Breinig*, 26 Pa. St., Page 161. The courts have held that even where the wife was convicted of felony which it would appear would not require counsel, upon a rule if she wishes to defend, alimony was allowed: *Van Riper v. Van Riper*, 3 Lancaster L. R., Page 107. Where the husband was in feeble health and needed all his income, an order for counsel fees was made: *Schureman v. Schureman*, 7 Pa. County Court Reports, Page 100. As before indicated,

the libellant earns Eighty (\$80.00) Dollars per month and pays nothing for the support of his wife and children at the present time, Five (\$5.00) Dollars a week alimony for his wife, and counsel fees amounting to Fifty (\$50) Dollars would seem to be reasonable under all the circumstances of this case.

Now February 21, 1916, rule for alimony and counsel fees made absolute, the alimony to be paid by the libellant to the respondent during the pending of these proceedings in divorce is fixed at Five (\$5.00) Dollars per week from the date of this order; Fifty (\$50.00) is also allowed for counsel fees.

COMMONWEALTH v. LEBO.

Fish Laws—Deterring Fish Warden—Act of May 1, 1909, P. L. 353, Sec. 25.

A defendant cannot be convicted of violating section 25, of the Act of May 1, 1909, P. L. 353, on a vague threat; it not being shown that any person was at that time and place violating the fish act, and that the fish warden was about to make an arrest, or that the defendant, by threat, menace or force or in any manner attempted to deter or prevent the fish warden from performing his duty.

In the Court of Quarter Sessions of Lehigh County. Commonwealth of Pennsylvania v. Harry D. Lebo. Appeal on Special Allocatur.

Allen W. Hagenbuch, for Commonwealth.
Warren K. Miller, for Defendant.

Groman, P. J., February 21, 1916. The defendant, Lebo, was arrested for violating Section 25 of the Act of May 1st, 1909, P. L. 353, which reads as follows: "Any person or persons who shall by threat, menace or force, or in any manner attempt to deter or prevent any fish warden, or other person authorized to make arrests for violation of the fish laws, from enforcing or carrying into effect any provision of this act," etc. After a hearing before the alderman, the defendant was found guilty and sentence imposed; on May 9th, 1914, a rule to show cause why a special allocatur should not be allowed was entered; on June 28th, 1915, the rule for a special allocatur

was made absolute and an appeal allowed. On December 21st, 1915, counsel for parties filed an agreement to submit the matter upon the entire record in the case; depositions had been taken previously. This agreement then would have the same force and effect as though a hearing was had on this appeal.

Upon a reference to the testimony taken before the alderman on the part of the Commonwealth, we find the following set out in the justice's transcript: W. J. Acker called and sworn, states: "that he was looking for fish law violators, at or near the pumping station of the City of Allentown; the defendant, Harry Lebo, after watching the warden for some time and after being told by the warden that he had deterred him from doing his duty, which he (defendant) denied, and then said to the warden: "You are going to get a god dam good licking some time, and the gun you carry we will take away from you." Under cross-examination Acker stated that he had knowledge that a fellow was looping fish near there and was watching him in order to arrest him. Referring to the depositions filed in this case, we find the depositions throw no additional light on the testimony of Acker. There was no testimony on the part of the Commonwealth showing that any person was at that time and place violating the fish act, and that the fish warden was about to make an arrest, or that the defendant, Lebo, by threat, menace or force or in any manner attempted to deter or prevent the fish warden from performing his duty. This is practically all the testimony adduced on the part of the Commonwealth before the alderman relevant to the question involved. Edwin Shutt called and sworn before the alderman testified that he heard Lebo say while Acker passed the pumping station, "There goes the son of a bitch," then "There goes the crook," that "the warden would get a damn good licking one of these nights and the gun taken away from him." The deposition of Harvey Held who was called and sworn is as follows:

Q. Did Lebo say anything to you? A. No, it was Shutt who came over and said: 'You better look out, the fish warden is over here watching you.' I said, 'Let him watch; I don't care; I am fishing within the law; I am always fishing.'

Q. When did you say that? To whom did you say, "I don't care?" A. To Shutt.

Q. Did you say that the day that Lebo was there? A. Yes.

Q. Did Lebo in any way send a warning to you? A. No.

Q. Did Lebo say anything to you? A. No, sir.

Q. Had you and the other gentleman any conversation or warning from Lebo? A. No.

Q. When did you see Lebo and Acker together? A. Right after that; they were over there. What they said I couldn't hear.

Q. You said Lebo in no way, as far as you know, interfered with the arrest? A. No, it was Shutt that hollered over, "you better watch out, Acker is over here watching you." I said, "I don't care, I am fishing within the law."

The statute in question being a penal statute or quasi penal statute must be strictly construed. The testimony submitted by the Commonwealth to warrant a conviction must be clear, convincing and free from doubt. The testimony of the Commonwealth itself leaves a doubt, and taking in connection therewith the testimony of the defendant and the witnesses called in his behalf, it seems to the Court that a very serious doubt was raised, that the defendant was entitled to the benefit of the doubt, and that the conviction before the alderman cannot be sustained. The testimony of the Commonwealth would seem to indicate that the charge before the alderman, if anything, should have been surety of the peace instead of charging a violation of the fish act in question.

Now February 21, 1916, defendant discharged.

BURKEY v. BURKEY.

Divorce—Desertion—Intention to Desert—Domicile.

Where a wife and husband have, by common consent, lived apart from each other with their own relatives until they could earn money to go to housekeeping, and the wife subsequently leaves the place she had been living, and goes to another city, and coincident with her departure sends a letter to her husband stating her dissatisfaction with the original arrangement, and her intention to remain away, saying that she cannot tell if she will ever see him again, her leaving constitutes desertion, and the husband is entitled to a divorce, the desertion having continued for more than two years.

A voluntary arrangement between husband and wife that each will temporarily live with relatives, makes the wife's stopping place the common domicile in the sense in which the divorce law speaks of the withdrawal from the common domicile, with intent to abandon marital relations, as a desertion.

In the Court of Common Pleas of Berks County. No. 3 August Term, 1915. Divorce. Exceptions by libellant to Master's Report.

W. A. Shomo and Leonard G. Yoder, for Exceptant.
Walter B. Freed, Master.

Opinion by Endlich, P. J., February 7, 1916—The learned and conscientious Master to whom this case was referred has recommended a decree adverse to the libellant, and the latter has excepted to the report. The rules of practice do not require or contemplate the filing of exceptions: See *Stoner v. Stoner*, 2 Berks Co. L. J. 53. It is not, therefore, necessary to treat those formulated in detail. The question is whether a divorce ought to be granted or not upon the record that is before us. After a very careful examination of it, it is impossible for us to agree with the Master's conclusions and recommendation.

The facts of the case, as gathered from the Master's findings and the evidence annexed to his report, are plain enough. The parties went from this state to Amsterdam, N. Y., and were there married August 26, 1911. For about five weeks they were at housekeeping there. Then they boarded in rooms, both working and earning, until February 1, 1913, when they returned to Pennsylvania. Between them they arranged that, until they could again go to housekeeping, the libellant should live with his parents in Hamburg, this county, working, and the respondent with her sister in Reading, also working,—the libellant visiting her on Saturdays and staying with her until the following evening. This arrangement was carried out. The respondent by her earnings supported herself and paid her rent, receiving apparently but \$10 from the libellant during this period. On April 11, 1913, the respondent left, going back to Amsterdam, after writing a letter to libellant announcing her purpose, which is in evidence and will be referred to hereafter. She wrote to him again a few weeks

later from Amsterdam, where she was at work, (this letter being lost,) and on one occasion visited Reading, where she returned about December 25, 1914. She has been living here since that time. Up to her departure there were no complaints on her part and no expressions of dissatisfaction with their manner of living. There seems to have been no disagreement or friction between the parties. On the other hand, there has been on neither side any effort to get together again. The respondent, indeed, has repeatedly declared that she will never return to the libellant. On his part, he has shown some degree of indifference to the separation from the respondent; but he has spoken no word and done no act assenting to it expressly or by implication. He had about \$300 invested with his father and \$100 saved and deposited in bank,—not enough in his opinion to go to housekeeping.

If there were nothing else in the case than the facts recited, there could hardly be any doubt that the charge of desertion by respondent is made out and that libellant is entitled to a decree. The voluntary arrangement between the parties obviously made the wife's stopping place the common domicile in the sense in which the divorce law speaks of the withdrawal from the common domicile, with intent to abandon marital relations, as a desertion. If the libellant has taken no step towards reconciliation, it is to be remembered that he is the party injured, not the one who committed the wrong. It was the respondent who began the separation, and it was for her to offer to return.

The Master, however, lays great stress upon, in truth gives decisive effect to, the letter, above referred to, which respondent wrote to libellant when she was about to leave. It is treated by the Master less as evidence of past occurrences alluded to in it, (for which purpose it is hardly competent: see *Ranck v. Brackbill*, 209 Pa. 499, 502,) than as throwing light on the writer's state of mind. The part of it emphasized by the Master reads as follows:

“ * * * Now since I see how I must live here neither married or single I am so blue that at times I feel as though I ought to do something desperate because you will not take me to housekeeping until we have enough

money to buy a house and I cannot earn enough to save a lot and I know that you would be mean to me some time for that reason and I don't think I could stand another year of the same treatment I had. You don't seem to bother about me at all. When you were away from me two weeks you did not even send a card and this week did not say if you were coming and have not heard from you so far so I don't believe you will miss me very much when I am gone, at least you always said you wouldn't. I expect to leave to-day (Friday) afternoon at 3 o'clock train. I am going to Philadelphia for a short time and don't know where I will land from there. Some place so I can make money anyway Bobby don't be surprised at this. You know I told you I would go some day and the time has come. Now some day when we are older we may realize more the ways and life of married people and probably things may turn out better and brighter for us both but so far I can't see anything because I think if you were anxious to live with me again you would have taken the small amount of money out of bank and could of furnished a few rooms anyways, but instead you still insist on investing it in your father's house and we don't know when we will get it out not for a few years anyway and I can't stand living this way and so lonely. I am all broke up and I have cried for the last two nights but I think this is for the best for I don't think you ever did or ever will care for me in the way you should and I will be patient to see how you turn when you are a little older. You know I can't give love and receive nothing in return the way I have been doing all the while. Now think back of the days I used to spend in N. Y. when you did not care for me and you will see that I am right so I will close now and I can't tell if I ever will see you again or not but I still give all my love to you."

The Master is deeply impressed with this as evincing no purpose to desert, but as a sincere outburst of sorrow, love and yearning for home life, as well as an honest attempt to induce libellant to remedy the discomforts of her mode of life. There might be some cause for so viewing it, if it had given the libellant an opportunity to correct what it complains of, instead of being contemporaneous with the writer's definitive

departure,—if it did not show that she had pondered her course of action,—and if in the closing sentence it did not foreshadow the finality of her departure. “That actions speak louder than words, is sound law as well as proverbial wisdom:” *Graham v. Dempsey*, 169 Pa. 460, 462. Formal protestations of affection, etc., cannot stand against the practical demonstration of the contrary. And then, too, as pointed out in *Loomis v. Loomis*, 2 Berks Co. L. J. 56, impressions of sincerity, and the like, cannot take the place of positive evidence or supply what is lacking in it. They are not themselves evidence, and they ought to have something in the nature of evidence to rest on. If the Master had had the respondent before him, (which he did not), his impressions as to her sincerity in writing as she did would have a significance which would dispose us to defer to them. As it is they are entitled to no such weight. Proceeding simply upon the face of the letter, it admits of the conclusion that, conscious of the wrongfulness and injustice to her husband of what she was about to do, she was trying to make out some sort of a plausible apology for it. In view of the temporary character of the arrangement under which they were living, and of her assent to it, and in the light of her subsequent conduct and declarations, this seems to us to be the more probably correct interpretation of the letter. And it certainly shows a purpose to leave the libellant and discontinue marital relations,—a purpose entertained and nursed for some time previously, and effectuated without any warning to the libellant, or any apparent disposition to remain with him under changed conditions. We are of the opinion that it does not derogate from or qualify the facts above rehearsed, and therefore does not stand in the way of the libellant’s right to the decree he seeks, but that we are bound to enter that decree.

A decree granting the prayer of the libel will be entered.

FIELDS BRICK CO. v. BLAUHUT.

Mechanics' Lien—Sub-contractor—Notice of Intention to File Lien—Sufficiency of Lien—Averment of Service of Notice—Striking Off Lien—Rule to Strike Off After Sci. Fa. Issued—Failure to Make Contractor Party to Lien.

A mechanics' lien filed by a subcontractor which fails to aver when and how notice of intention to file the lien was made is fatally defective and will be stricken off.

In such case a rule to strike off the lien entered after a scire facias is issued, is in time.

The failure to include the contractor as a party in a scire facias upon a subcontractor's lien should be taken advantage of by a motion to quash the writ and not by a rule to strike off the lien.

In the Court of Common Pleas of Delaware County.
Rule to strike off Mechanics' Lien in No. 1324, December Term, 1914.

A. B. Geary, for Rule.

J. DeHaven Ledward, Contra.

May 8, 1916. Broomall, J. The plaintiff filed a mechanics' lien on December 31, 1914, against Julia Blauhut, owner or reputed owner, and Howard D. Taylor, contractor, for materials furnished to the property of the owner on a contract with the sub-contractor, and issued a scire facias thereon on March 6, 1916, against Julia Blauhut, owner or reputed owner. On the petition of the owner presented on March 14, 1916, a rule was entered on the plaintiff to show cause why the mechanics' lien should not be stricken from the record based upon certain objections, one of which is that the lien does not aver when and how service of notice of intention to file the lien was made. An examination of the lien shows that no such averment is contained therein. Under the eighth section of the Act of June 11, 1901, P. L. 431, Stewart's Purdon, Vol. 3, page 2474, pl. 17, it is an essential prerequisite to the right of lien of a sub-contractor that such notice be given, and that the date and manner of such service shall be averred in the lien. Without this the lien is not self sustaining and must be stricken from the record; Keeley v. Jones, 35 Pa. Supr. Ct., 642, and this has not been changed by the Act of April 17, 1905, P. L. 172 Stewart's Purdon, Vol. 5, page 5664, pl. 2; Bametzsreider v. Canevin 44 Pa. Supr. Ct., 18. The issuing of a

sci. fa. in this case has not deprived the owner of the right to have the lien stricken from the record; Keely v. Jones, supra.; Miller v. Fitz, 41 Pa. Supr. Ct., 582; Clark v. Bittle, 11 Del. Co. Reps., 80. The sci. fa. upon this motion will have to be treated as if it had issued against the owner and contractor. The irregularity of not including the contractor in the writ would have to be taken advantage of by a motion to quash the writ.

The omission referred to is fatal to the lien, and it is unnecessary, therefore, to refer to the other objections to it..

And now, May 5, 1916, the rule to strike the lien from the record is made absolute and the said lien is now stricken from the record.

SCHEIRER v. GROSS.

Justice of the Peace—Jurisdiction—Negligence.

A justice of the peace has jurisdiction of an action to recover damages suffered in a collision with an automobile on the public highway, it being alleged that defendant was negligent in operating the automobile.

In the Court of Common Pleas of Lehigh County. Richard H. Scheirer v. Edwin J. Gross. No. 117 April Term, 1915. Appeal from Judgment of Justice. Motion in arrest of judgment, and rule for new trial.

Butz & Rupp, for Plaintiff.

Charles D. Thomas, for Defendant.

Groman, P. J., February 21, 1916. In the foregoing proceedings, an appeal to the Common Pleas from the judgment of an alderman and ex officio a justice of the peace, the jury rendered a verdict in favor of the plaintiff. The defendant on motion in arrest of judgment raises the question of jurisdiction; a motion for a new trial was also filed. An examination of the transcript shows that defendant raised the question of jurisdiction before the alderman.

The form of the action before the justice and upon appeal is not so material, as the form of action may be changed or an amendment allowed provided the cause of

action is not changed: *Esher v. Flagler*, 17 S. & R., Page 141; *Steckel v. Weber*, 20 Pa. St., Page 435; *Weiler v. Kerschner*, 109 Pa. St., Page 219, besides a line of cases commencing with *Graham v. Vandalore*, 2 Watts, Page 131; *Bratton v. Seymour*, 4 Watts, Page 329; *Johnston & Lyon v. Fessler*, 7 Watts, Page 48; *Seitz & Co. v. Buffum & Co.*, 14 Pa. St., Page 69; but had the alderman jurisdiction of the cause of action? The plaintiff seeks to recover damages from the defendant suffered in a collision with plaintiff's auto on the public highway, alleging that defendant was negligent in operating the car. The alderman issued a summons in trespass. It is a settled distinction that where an act is done which is in itself an immediate injury to one's person or property, that there the remedy is usually by an action of trespass *vi et armis*: *Marsteller v. Trimble*, 6 Binn., Page 33; *Smith v. Rutherford*, 2 S. & R., Page 358; *Ream v. Rank*, 3 S. & R., Page 215; *Hobbs v. Geiss* 13 S. & R., Page 416.

Applying the above rule to the facts before us, the Court is of the opinion that the act done was itself the cause of the immediate injury to the plaintiff's property, and that the alderman had jurisdiction. This conclusion is strengthened by the views held by the Court in *Herri-gas v. McGill*, 1 Ashmead, Page 152; *Bruch v. Rissmiller*, 12 Northampton Reporter, Page 12; *Marsteller v. Trimble*, 6 Binn., Page 33 already cited.

The Court is not convinced that error was committed in the trial of the cause or its submission to the jury; the rule for a new trial will have to be dismissed.

Now February 21, 1916, motion in arrest of judgment refused, and rule for new trial discharged.

MORGAN & FINLAY v. MEEKINS & BICKLEY.

Evidence—Parol Evidence to Change Writing—Secondary Evidence.

Plaintiff cannot offer parol testimony to change or alter a writing already introduced by him, unless fraud, accident or mistake is averred and proven.

Secondary evidence, taken in a prior case, cannot be introduced when the witness, who had testified therein, could have been procured through a subpoena.

In the Court of Common Pleas of Lehigh County. Ralph C. Morgan and Ralph E. Finlay, co-partners, etc., v. Walter A. Meekins and George T. Bickley. No. 10 September Term, 1915. Assumpsit. Motion to Take Off Non Suit.

George W. Aubrey, for Plaintiff.
Ralph H. Schatz, for Bickley.

Groman, P. J., February 21, 1916. Suit was brought to recover damages for breach of contract. During the course of the trial the plaintiff offered in evidence the following order: "Allentown, Pa., Mar. 29, '15. Messrs. Morgan and Findlay, New York City. Dear Sirs: This is to confirm our order to you to sell 192 shares International Motor Company stock at 4 or better. Order good for March 30th. Walter A. Meekins, George T. Bickley." The order was admitted without objection on the part of the defendants. The plaintiffs then offered parol testimony for the purpose of changing or altering the writing already introduced in evidence; objection was made on the ground that such testimony could not be received unless fraud, accident or mistake was shown; this was not done nor attempted to be done. After the close of plaintiff's case, a motion for the entry of a compulsory non suit was made and sustained. The matter is now before us on a motion to take off the non suit.

The writing offered in evidence became the expression of the final result of negotiations between the parties to the transaction, and consequently the only evidence of the transaction. What took place prior thereto, or what was said relative to the matter is now found embodied in this writing unless fraud, accident or mistake is averred and proven: *Martin and Monroe v. Berens*, 67 Pa. St. Page 459, and authorities therein cited; *Wodock v. Robinson*, 148 Pa. St., Page 503; *Pioso v. Bitzer*, 209 Pa. St., Page 503. This writing evidences the completed transaction; nothing more remained to be done but to carry out the terms.

The plaintiff also offered in evidence the transcript of testimony taken at the trial of a proceeding in equity between the same plaintiffs and three defendants, two of the defendants in the equity proceeding being the two

defendants in this suit. It appears that one of the defendants herein was to be called as a witness by the plaintiff; no subpoena, however, had been served to secure his attendance at court. The plaintiff evidently relied upon his appearance in court without a subpoena on the theory that he would appear to defend this suit. The witness is a resident of Wilkes-Barre, Pennsylvania, ninety miles or so distant from Allentown, Pennsylvania, where the trial was had; the defendant was within the jurisdiction; the plaintiffs had knowledge early in the week for which this case was set for trial, that he was in his home at Wilkes-Barre, and he had sent word he would not appear to defend this suit. The Court sustained this objection and is not convinced error was committed by doing so.

Now February 21, 1916, motion to take off non suit dismissed.

JACOBS, EXECUTOR, v. STRAUSS.

Evidence—Witness—Competency—Adverse Interest.

One, dealing with another since deceased, is a competent witness, where he has no interest in the event of the suit, acquires no right, loses nothing, nor incurs any liability or responsibility dependent upon the event of the suit.

That stock was given to such a witness by one now deceased, for a certain expressed purpose, can be shown by him.

In the Court of Common Pleas of Lehigh County. Frank Jacobs, Executor, etc., of David R. Kline, deceased, v. Martin H. Strauss. No. 24 January Term, 1915. Assumpsit. Jury trial waived.

M. P. Schantz, for Plaintiff.

Fred B. Gernerdt, for Defendant.

Groman, P. J. February 21, 1916. Findings of fact.

1. The plaintiff is the executor of David R. Kline who died testate September 22nd, 1912; letters testamentary were duly issued by the register of wills of Lehigh County to Frank Jacobs who qualified as executor.

2. David R. Kline was a director and stockholder of the Citizens Deposit and Trust Company of Allentown, Pennsylvania, and the owner of one hundred and thirty-three shares of the capital stock of said trust company.

3. On May 27th, 1908, David R. Kline delivered the following paper to Fred H. Lichtenwalner, Treasurer of said Trust Company: "Allentown, Pa., May 27-08. To the Citizens Deposit and Trust Company: In consideration of you having discounted or purchased, or in the future, discounting or purchasing the note or notes of the Lehigh Tungsten Mining and Milling Company in the total sum of Five Thousand Dollars, I agree to pay said notes at maturity and at the maturity of every renewal of each of them for whole or part. I agree to pay you said loans and every part thereof at any time demand may be made upon me for the same without regard to whether any demand is previously made upon the said or not; holding myself primarily liable to you for said loans with interest at the maturity of the renewal or renewals of said notes or any of them, to the same effect and intent as if I was a drawer on said notes. It being the true intent hereof that this undertaking on my part shall apply to all notes on which the name of may appear whether as drawer, payee, endorser, or howsoever. Martin H. Strauss, D. R. Kline."

4. On December 3rd, 1912, decedent applied to said Trust Company for a loan for himself, and offered the following note for discount: "Allentown, Pa., Dec. 3, 1912. \$4750.00. Forty days after date we promise to pay to the order of ourselves at the Citizens Deposit and Trust Company, Forty-seven Hundred Fifty Dollars, without defalcation, for value received. Lehigh Tungsten M. & M. Co., Martin H. Strauss, Treas." Endorsed: "Lehigh Tungsten M. & M. Co., Martin H. Strauss, Treas." The said Trust Company became the purchaser or owner of said note.

5. At the time the note was purchased by the Trust Company the decedent made the following verbal statement to Fred H. Lichtenwalner, Treasurer of the said Trust Company: "Fred, I will give you my stock, I will give it to you, the bank cannot take this stock as collateral and it was no collateral, this is no collateral, I will give you this stock." Stock was to be held "for the payment of this note which I think he said, I might ask for a renewal, I offered to give him a receipt."

6. Fred H. Lichtenwalner held said stock individu-

ally and not as an officer of the Trust Company, for the purposes expressed in the declaration made by decedent—to assume the payment of the note of December 3, 1912.

7. After the death of David R. Kline the stock was sold and the note paid in full.

8. Upon payment of the note by Fred H. Lichtenwalner to the Trust Company, the said Trust Company executed the following assignment: "For a valuable consideration, we hereby sell, assign, transfer and set over unto the estate of David R. Kline, deceased, all our right, title and claims whatsoever in, under and by virtue of the guaranty on the reversed side hereof, against the said estate of David R. Kline, deceased, and Martin H. Strauss, or either of them, with the right on the part of the said estate of David R. Kline, deceased, to demand, sue for and deliver a receipt to the said parties or either of them for the whole or part of said sum, but we do not in any way guarantee or warrant said rights. Citizens Deposit and Trust Co., Allentown, Pa. By Fred H. Lichtenwalner, Treas. Feby. 14-13."

9. The record fails to show any other connection between the parties to this suit other than that set forth in the paper dated May 27, 1908.

CONCLUSIONS OF LAW.

The decedent handed one hundred and thirty-three shares of stock to Fred H. Lichtenwalner as an individual, not as an officer of the Trust Company, to hold for certain intents and purposes; there was no personal liability on the part of the witnesses but to see that the proceeds of the stock were eventually applied to the purpose for which he held the stock: the payment of the note in question.

Is then Lichtenwalner a competent witness in so far as his testimony relates to this transaction, or is he excluded on the ground of interest? From the testimony offered we can nowhere find that the witness has an interest in the event of the suit, he neither acquires a right, loses anything, nor incurs any liability or responsibility dependent upon the event of this suit. The remote interest he had as an officer of the Trust Company was divested upon an assignment by the Trust Company to the executor of decedent's estate. The witness had no adverse interest in the event of this suit and is, therefore,

competent: *Dixon v. McGraw Bros.*, 151 Pa. St., Page 98; *First National Bank v. Gerli*, 225 Pa. St., Page 260; *Metcalf v. Buck*, 36 Pa. Sup. Ct., Page 66. The testimony of the witness then becomes decisive of this case; the stock was handed to the witness by the decedent for a certain expressed purpose. In fact the stock was to be held in trust to secure the payment of the note in question. Nowhere does it appear that this was an obligation coming within the terms of the paper dated May 27th, 1908; in fact it appears that this was a personal obligation of decedent. The Court is, therefore, of the view that plaintiff cannot recover, and a verdict for the defendant should be entered.

Now February 21, 1916, it is ordered that the prothonotary forthwith give written notice to the parties in interest, or their attorneys, of the filing of this decision, and if no exceptions thereto be filed in the prothonotary's office within thirty days after the service of said notice, judgment is hereby directed to be entered in favor of the defendant and against the plaintiff for the costs legally taxable in this proceeding.

FRANKENFIELD v. FRANKENFIELD.

Divorce—Desertion—Justification.

The respondent cannot defeat the right of the libellant to a decree in divorce, on the ground of desertion, when the respondent's evidence, as to personal indignities, is vague and uncertain, and when these acts were not the cause for leaving the libellant.

In the Court of Common Pleas of Lehigh County. *Phaon G. Frankenfield v. Sarah D. Frankenfield*, No. 63 April Term, 1915. In Divorce. Exceptions to Master's Report. Exceptions Dismissed and Decree made.

Butz & Rupp for Libellant.

Edwin K. Kline and Thos. K. Leidy, for Respondent.
Malcolm W. Gross, Master and Examiner.

Groman, P. J., February 21, 1916. The libel in divorce charges desertion. The respondent filed an answer denying the unlawful and malicious desertion, and justified the desertion by charging the libellant with making "her life burdensome and her condition intoler-

able;" further alleging certain indignities to her person, and thereby forced the respondent to withdraw from the libellant's house and family.

The question first to be determined is whether the acts complained of in the answer filed by the respondent would entitle her to a decree in divorce if the libel charged the offering of "such indignities to her person as to render her condition intolerable and life burthen-some" and thereby forced her to withdraw from the house and family of the respondent therein. An examination of the testimony convinces the court that the conclusion reached by the master and examiner in respect to the above proposition will have to be sustained. The testimony submitted on this point covers a period of a number of years, is vague and rather indefinite, more especially so when we keep in mind the fact that the respondent herself testifies that the acts of cruel and barbarous treatment complained of were not the cause for leaving her husband. *Gordon v. Gordon*, 48 Pa. St., Page 228, besides other authorities that might be cited, establishes the rule applicable to this point in this proceeding. Has the libellant made out his case so as to entitle him to a decree in divorce on the ground of desertion? Keeping in mind the principles laid down in *Van Dyke v. Van Dyke*, 135 Pa. St., Page 459, and *Whelen v. Whelen*, 183 Pa. St., Page 293, relative to desertion, we accept the view of the Master.

The Court cannot too highly commend the master and examiner for the able report made in this matter and the manner in which he performed the duties of his appointment. He has set a standard in that respect other masters and examiners appointed by the Court might emulate.

Now February 21, 1916, exceptions dismissed, and decree in divorce granted.

WRIGHT v. LEHIGH STEEL AND IRON CO.

Equity—Fraud—Evidence.

In a bill in equity charging a transfer of assets, real and personal, for the purpose of hindering, delaying and defrauding creditors, the proof of fraud must be direct, or, at least, clearly established, and will not be presumed.

In the Court of Common Pleas of Lehigh County. Philip E. Wright v. Lehigh Steel and Iron Company. No. 1 April Term, 1909. In Equity. Bill in Equity. Bill dismissed.

Dewalt & Reno and E. Spencer Miller, for Plaintiffs.
Edward Harvey, Reuben J. Butz, Dallas Dillinger, Jr., and Calvin E. Arner, for Defendants.

Groman, P. J., March 6, 1916. Findings of Fact.

1. The plaintiff brought an action in assumpsit against the defendant in the Court of Common Pleas of Lehigh County as of September Term, 1906, No. 12, wherein he sought to recover from the defendant the sum of \$825.29, for which judgment was confessed November 13th, 1906.

2. The Lehigh Steel and Iron Company was the owner of a tract or several tracts of land on which were located its works subject to a mortgage of \$150,000; it further was the owner of certain personal property consisting of six horses, five wagons, twelve wheelbarrows, foundry tools and a quantity of pig iron.

3. The Lehigh Steel and Iron Company on July 28th, 1903, transferred all its asserts appurtenant to its works to the Lehigh Iron and Steel Company, which latter corporation continued the active operation of the business formerly conducted by the Lehigh Steel and Iron Company.

4. The Lehigh Iron and Steel Company was a New Jersey corporation organized to take over the property and business of the Lehigh Steel and Iron Company, a Pennsylvania corporation. William H. Ainey was the president of each, and the treasurer of the former company.

CONCLUSIONS OF LAW.

The plaintiff failed to establish fraud, or that the conveyances in the bill of complaint referred to, were made to hinder or delay the creditors of the company.

ARGUMENT.

The original bill of complaint filed January 29th, 1909, as of No. 1, April Term, 1909, charged that the

then defendants transferred and conveyed the assets, real and personal, of the company for the purpose of eluding the just creditors of the Lehigh Steel and Iron Company. Fraud was incidentally charged in the sixth paragraph of the bill.

An amended bill filed June 6th, 1910, specifically charges that the conveyances set forth and referred to in the bill hindered, delayed and defrauded the creditors of the defendant companies.

After the complainant closed his case, a motion to dismiss the bill followed; the record fails to show what disposition was then made of the motion by the court, but the complainant on March 10th, 1914, moved to strike off the order dismissing the bill, and asks for a reinstatement of the same, so it will be assumed that the bill was dismissed.

The gist of the whole matter is: Did the testimony submitted establish fraud? The Court in the admission of testimony held to the view that all the circumstances of the transactions tending to show an intent to commit fraud were relevant, and admitted such testimony. Proof of fraud must be direct or, at least, clearly established: *Jones v. Lewis*, 148 Pa. St., Page 234; *Sebring v. Brickley*, 7 Pa. Sup. Ct., Page 198. Fraud is not presumed, in fact, the presumption is that the transaction complained of was an honest transaction: *Shoemaker v. Kunkle* 5 Watts, Page 107. Fraud must be clearly proven: *Jackson v. Summerville*, 13 Pa. St., Page 359; *Abbey v. Dewey*, 25 Pa. St., 413; *Bentz v. Rockey*, 69 Pa. St., Page 71; *Pocono Spring Water Company v. American Ice Co.*, 214 Pa. St., Page 640.

Applying the above rules to the testimony submitted, the court reaches the conclusion that the proof of fraud fails to measure up to such requirements; the motion to strike off the order dismissing the bill, and praying for a reinstatement of the same will have to be dismissed.

Now March 6, 1916, defendant's counsel is directed to draft a decree in conformity with the intentions of the court as hereinbefore expressed.

HAMILL ET AL. v. GROFF ET AL.

Title to Real Estate—Intestate Laws—Blood of First Purchaser—Scire Facias—Adverse Possession—Statute of Limitations.

On scire facias to revive a judgment against H., judgment was entered but no amount stated on the record. Execution was issued and the real estate was sold by the sheriff but the sale set aside, and it was subsequently sold on an alias vend. ex. without another levy to A. H., son of H. A. H. died intestate, leaving a widow, to whom a posthumous son was born who died without issue. Subsequently the widow re-married and had other children, to whom she conveyed the said real estate. On ejectment by decedents of H., against the children of the widow of A. H.

Held, that A. H. had title to the real estate and that on his death it descended to his unborn son, and on his death vested in his mother for life, and after her death in the next of kin of the blood of the first purchaser, being brothers and sisters of A. H., and their descendants, the plaintiffs, were entitled to binding instructions.

The statute of limitations does not run against parties in remainder until after the death of a tenant for life who has aliened in fee.

Rules for judgment for defendant n. o. v. and for a new trial. C. P. of Lancaster County. December Term, 1914, No. 17.

F. Lyman Windolph, J. M. Groff and B. F. Davis, for Rules.

Frank S. Groff, Contra.

March 25, 1916. Opinion by Landis, P. J. The facts of this case are undisputed, and therefore when presented upon the trial the Court directed a verdict in favor of the plaintiff. We are now asked to review that conclusion, and we have, therefore, again considered the law, which we think is applicable to the situation arising out of them, with however the same result.

By virtue of divers deeds of conveyance Abraham Harr became the owner in fee simple of certain tracts of land located in Bart Township, this county, of which the farm now in dispute is a part. Judgment was entered against him in the District Court of the County on July 14, 1841, by the Farmers Bank of Lancaster, to June Term, 1841, No. 218, for \$2,000. A scire facias to revive this judgment was issued on February 22 1845, to June Term, 1845, No. 6, and on June 11, 1845, on motion in open court, judgment was entered, but no amount was stated on the record. On October 28, 1845, a fi. fa. was issued to

December Term, 1845, No. 26, and the entry on the same is: "Real estate levied on, inquisition held and condemned and appraised at \$9,144." On December 2, 1845, a writ of vend. ex. was issued to February Term, 1846, No. 1, for a real debt of \$2,000, with interest from July 13, 1841. The real estate levied upon was sold on this writ. On February 2, 1846, a rule was granted to show cause why sale should not be set aside, and that rule was made absolute, and the sale was set aside. On March 19, 1846, an alias vend. ex. was issued to June Term, 1846, No. 12; upon this writ the defendant's real estate was sold for \$12,000. The writ does not mention to whom it was sold, but the Minute Book of June 13, 1846, says: "The Sheriff acknowledged the following deeds, proclamation having been made on Monday last One to Abr'm Harr, property late of Abr'm Harr," and in Book of Sheriff's Deeds No. 1, at page 415, there is a record of a deed from David Hartman, Sheriff, to Abraham Harr, Jr., for a tract of land in Bart Township containing two hundred acres more or less. This tract includes the land now in dispute. It was located in Bart Township, but it is now in Eden Township, which was formerly a part of Bart Township.

Abraham Herr, or Harr, Jr., died on June 24, 1851. He left no will, and letters of administration were granted to his brother, Benjamin Herr. He died seized of this real estate. He left surviving him a widow, Annie B. Herr, and a posthumous child, whose name was Abraham B. Herr, was born on October 8, 1851, after his death. Abraham B. Herr, the son died when he was about two years old, leaving his mother to survive him. She was, at that time, living on this tract of land, and she continued to do so until her death, which occurred on ———, 1914. She was a widow about eight years, when she married Augustus Withers. The defendants in this suit are her children by her second husband. The father and mother of the decedent, Abraham Herr, Jr., were Abraham Herr and Margaret Herr. Abraham Herr died in March, 1851, and Margaret Herr died in 1854. Their children were Benjamin Herr, Abraham Herr, John Herr and Adam Herr, and Elizabeth Hamill and Mary Kauffman. The plaintiffs are their descendants.

At the trial it was attempted to show that Annie B.

Withers was in continuous occupation of the premises more than twenty-one years, and she had, by this, and by claiming the land in dispute, secured a title by adverse possession. She made a deed for the land on April 2, 1886, to her children, by her second husband, namely, John B. Withers, Howard H. Withers, Thomas A. Withers and Mary H. Groff, and it is claimed that they hereby acquired a title in fee simple. We were of the opinion that she, being the life tenant, could not thus blot out the title of the remaindermen, and for this reason we excluded this testimony. We are convinced that our conclusion in this respect was correct and that such a position is untenable.

We see no merit in the contention that as the judgment on the scire facias did not specify an amount, it was invalid. The original judgment was for \$2,000. The scire facias was issued to revive this judgment. When the Court ordered judgment to be entered on the scire facias, it necessarily was the amount of the judgment intended to be revived. It was, therefore, sufficient to sustain the original proceedings. In *Gray v. Coulter*, 4 Pa., 188, it was held that "a judgment by default in an action of debt, the amount not being liquidated and a like judgment on a sci. fa. to revive after plea pleaded, will sustain a fi. fa. and sheriff's sale, the nominal and real debt having been endorsed on the executions." In addition, it must be remembered that this complaint comes not from the defendant, but from strangers, and is a collateral attack upon those proceedings. The defendant, at the time, had his day in court and was duly heard, and the first sale was set aside on his application. Presumably he was thereafter fully satisfied. In *Cock v. Thornton*, 108 Pa., 637, Mr. Justice Clark said: "The objections made to the admission of the deed were, that the writ of venditioni exponas upon which the sale was made had never been returned; that the purchase money had never been fully paid, and that the sheriff's deed made pursuant to the sale had never been delivered. The first two grounds of objection, as the law now stands, are wholly dependent upon the validity of the third, because if the deed executed in due and proper form and regularly acknowledged was actually delivered, the first grounds of objection are removed. In numerous cases it had been

held by this Court that the acknowledgment of a deed is a judicial act and concludes all mere irregularities, however gross, in the process and sale. After acknowledgment, the validity of the title acquired by the purchaser cannot be questioned in any collateral action involving the title, except for the absence of authority or the presence of fraud in the sale." To the same effect is *Mencke v. Rosenberg*, 202 Pa., 131. In *Jackson v. Gunton*, 26 Sup., 203, *Rice, P. J.*, after stating the above proposition, says: "It is founded upon the conceded right of all parties having an interest in the question to appear and dispute the propriety or regularity of the official sale;" hence, said Justice Bell, 'mere irregularities, whether of omission or commission, which do not render the officer powerless, or taint the transaction with turpitude, may be cured by the tacit acquiescence of those who ought to speak in time:' *Shields v. Miltenberger*, 14 Pa., 76." See also *St. Bartholomew Church v. Wood*, 80 Pa., 219, and many other cases.

But concluding, for the sake of the argument, that the learned counsel for the defendant are correct in this objection, it seems to us that they are "fighting wind-mills." If the sale was invalid and the sheriff's deed for that reason ineffective, then the title did not pass to Abraham Herr, Jr., but remained in his father, Abraham Herr, Sr. Upon his death it descended to his children and grandchild, Abraham B. Herr. Upon the decease of the latter, the share of Abraham B. Herr vested in his mother, Annie B. Herr, for life, and she would have had thereby a right to possession as a tenant in common. In *Forward v. Deetz*, 32 Pa., 69, it was held that, "To give title to one of several co-heirs under the Statute of Limitations, there must be an actual ouster and disseisin of the other heirs;" that "to establish an ouster in such case, there must be some plain, decisive, unequivocal act or conduct of the party claiming amounting to an adverse and wrongful possession in himself and disseisin of his co-heirs." It was also held that the acknowledgment by a widow and one of the co-heirs in possession that the party claiming was the owner of the premises, and that they held under him is insufficient to establish an ouster by such party of his co-heir. In *Wells v. Becker*, 24 Sup., 174, it is said: "As between joint tenants, there

is no constructive ouster; positive hostile acts must be shown. The possession of a co-tenant is presumed to be pursuant to his title and consistent with the rights of his co-tenants: *Bennet v. Bullock*, 35 Pa., 364." It is not, however, necessary to place the case on this ground, and we do not do so, though it appears to us that the above cases amply cover it.

The conceded evidence shows that Abraham Herr, Jr., and his wife, Annie B. Herr, lived on this land at the time of his death. He claimed it as his own, and because of this she and her son remained upon it. If he owned it, and he undoubtedly did, it descended under the intestate laws of this Commonwealth to his unborn child subject to the dower of his widow therein. See Act of April 8, 1833, Sec. 14, P. L. 319. Under the third section of said act it is provided that in default of issue or widow or surviving husband, "the real estate shall go to the father and mother of such intestate during their joint lives and the life of the survivor of them." Therefore, on the death of Abraham B. Herr this real estate became vested in his mother during her life, and she had the sole right up to the time of her death to enjoy it. She could sell her life estate, if she thought fit, but she had no power to convey to her children, born of the second marriage, the fee. As Abraham B. Herr left neither issue, nor brothers or sisters, his real estate thereafter descended to and became vested in his next of kin, qualified, however, by the provision contained in the ninth section of said act, "that no person who is not of the blood of the ancestors or other relations from whom any real estate descended or by whom it was given or devised to the intestate, shall in any of the cases before mentioned take any estate of inheritance therein, but such real estate subject to such life estates as may be in existence by virtue of this act shall pass to and vest in such other persons as would be entitled by this act if the persons not of the blood of such ancestors or other relation had never existed or were dead at the decease of the intestate." The only persons conforming to this description were the brothers and sisters of Abraham Herr, Jr., the father of Abraham B. Herr, and in them and their heirs this real estate vested, subject to the life estate of his mother, Annie B. Herr, afterwards Annie B. Withers.

How then could the Statute of Limitations run against the plaintiffs? The widow died in 1914. Then, and then only, did their right of possession accrue. In *Gernet v. Lynn*, 31 Pa., 94, it is held that the Statute of Limitations does not run against parties in remainder until after the death of a tenant for life who has aliened in fee. In *Ege v. Medlar*, 82 Pa., 86, Mr. Justice Gordon, delivering the opinion of the Court, said: "The plaintiffs claim as heirs at law of Elizabeth Ege, the wife of George, by virtue of the deed of trust executed to John Miller for her use by Michael Ege, Sr., whilst the defendants claim under George Ege. Now it is obvious that if, as the plaintiffs contend, George Ege had an estate in curtesy in the lands thus conveyed to his wife, the right of entry did not accrue to them until his death, and hence the statute could not begin to run during that period." See also *Wolford v. Morgenthal*, 91 Pa., 30; *Shellenberger v. Ashworth*, 25 Pa., 152; *Davis v. Dickson*, 92 Pa., 365.

We are, therefore, of the opinion that the plaintiffs in this case were entitled to recover, and that the instructions to the jury were in accordance with the law. Both rules are, therefore, discharged.

Rules discharged.

BEAUMONT'S ESTATE.

Decedent's Estate—Widow's Exemption—Right of Widow Not Living With Husband.

A widow is entitled to the exemption, under the Act of 14 April, 1851, P. L. 613, notwithstanding she was not living with her husband at the time of his death, where such absence from his domicile was compelled by such indignities to her person, offered by him, as to render her condition intolerable and life burdensome.

Such exemption may be claimed out of real estate without regard to the value of the entire tract, and without regard to the fact that it is incumbered.

In the Orphans' Court of Delaware County. Exceptions to widow's inventory and appraisement in the estate of Eber H. Beaumont.

W. R. Fronefield, for Exceptions.
A. J. Williams, Contra.

Opinion by Johnson, P. J., and Broomall, J. June 10, 1916. Exceptions of Hannah Beaumont, a creditor of the decedent, have been filed to the approval of the inventory and appraisement under a claim of Regina Beaumont, widow of the decedent, for exemption. These exceptions are to the effect, first, that the widow was not living with the decedent at the time of his death, having deserted him many years ago; and, second, that at all events she is not entitled to an exemption out of the particular property in which it is claimed. Evidence has been taken from which the following facts are found:

1. Eber H. Beaumont died on May 12, 1916, and at the time of his death he was a resident of Delaware County, Pa.

2. Regina Beaumont is the widow of the decedent, having been married to him over forty-three years ago, and of this marriage there were two children.

3. About thirty-six years ago Eber H. Beaumont, with his wife Regina, and his two children, were living and cohabiting together in Delaware County, Pa.

4. About thirty-six years ago Regina Beaumont, by reason of such indignities to her person, offered by Eber H. Beaumont, as to render her condition intolerable and life burdensome, was forced to withdraw from cohabitating with him, and such absence of cohabitation continued until the time of his death.

This controversy has mainly turned upon the status of this widow with respect to the domicile of the decedent, which is raised by the first exception. It appears from the evidence that for some six months prior to their separation, he was in the habit of calling her vile opprobrious names, mixed with profanity, in the presence of their two daughters, who were then sixteen and seventeen years of age, and in the presence of others. That he occasionally struck her and assaulted her. That she would remonstrate with him, telling him that his conduct toward her was unbearable, and that unless he would desist from his abuse of her, she would have to leave him, when he would profanely express himself as indifferent to that course. And that finally about two weeks before she left, he removed all of the furniture and bedding except one couch from their habitation, compelling his wife and daughters to sleep on the floor, softened alone

with some carpet, only affording to them the consolation of seeing their husband and father in comfort occupying the couch. Under these circumstances she and her daughters left, and took up the battle of life alone. Shortly after his wife left him, he took to himself a housekeeper, who assumed his name, and who was living with him at the time of his death. She is the excepting creditor in this case. As long as twenty-four years ago he took title to some property and executed a mortgage, in the joint names of himself and this woman, designated as his wife. Under this evidence we have no difficulty in concluding, as set forth in the fourth finding of fact, that the separation was the result justifiably of the husband's wrongful acts, and that the desertion was by him.

The law of the case is without difficulty. The Act of April 14, 1851, P. L. 613, Stewart's Purdon, Vol. 1, page 1092, pl. 79, gives the exemption to the widow for the use of herself and family. This provision, being intended to relieve the necessities of a man's family, who are about him and dependent upon him, at the time of his death, primarily it is restricted to his household family, who are cohabiting with him. But there may be circumstances equivalent to cohabitation, for which the provision is equally applicable; as for instance, a man may be maintaining his family at another place, from where he himself resides, or as in this case, where he expels his family from his residence, and continues to be legally liable for their support. In the latter case the exemption is a substitute for such legal liability. Of course she may sacrifice her right by resigning from his family, which she does when she deserts him. But where he deserts her, and she maintains the family relation so far as it is in her power although actual cohabitation is suspended the family relation constructively continues, and she does not sacrifice her right; Terry's Appeal, 55 Pa., 344; Grieve's Estate, 165 Pa., 126; Balmforth's Estate, 26 Pa. Supr. Ct., 491. In the cases cited by the exceptant, where the claim was disallowed on the ground of a severance of the family relation, the separation was the voluntary act of the wife. But in our case it was compulsory.

As to the second exception, we see no difficulty. The claim is for the exemption out of realty under the Act of 1851. The appraisers have found that it cannot be

separated and set apart to her, without prejudice to or spoiling the whole. The quantum of real interest is unimportant, neither is the fact that it is subject to liens. It becomes a charge upon the land, which upon her application the Orphans' Court has power to sell to pay it; *Detwiler's Appeal*, 44 Pa., 243. We, therefore, find the following conclusions of law:

1. A widow is entitled to exemption, under the Act of April 14, 1851, P. L. 613, notwithstanding she was not living with her husband at the time of his death, where such absence from his domicile was compelled by such indignities to her person, offered by him, as to render her condition intolerable and life burdensome.

2. A widow is entitled to the exemption under the Act of April 14, 1851, out of real estate of her deceased husband, without regard to the value of the entire tract, and without regard to the fact that it is encumbered.

And we, therefore, make the following

DECREE.

And now, June 10, 1916, it is ordered, adjudged and decreed, that the appraisement of the property late of Eber H. Beaumont, deceased, elected to be retained by his widow, Regina Beaumont, under the Act of April 14, 1851, be approved.

A. R. CRESSMAN'S SONS v. JOHN HAAS, ET AL.

Attachment—Sale in Bulk.

The business of a licensed restaurant is not within the scope of the Act of March 28, 1909, P. L. 62, relating to sales in bulk without notice to creditors of the seller, and an attachment to recover part of property sold in bulk by a restaurant keeper will be dissolved.

Motion to dissolve attachment. In the Court of Common Pleas of Lackawanna County. No. 303, October Term, 1915.

Lee P. Stark, for Plaintiffs.

No appearance for Defendants.

C. B. Little, for Garnishee.

Newcomb, J., April 26, 1916. The proceeding is

under the attachment act of 1869 as amended, etc., founded on no actual fraud, but for the purpose of invalidating a sale of chattels as against the act of 28th March, 1905, P. L. 62, relating to sales in bulk without notice to creditors of the seller.

The Lohman Cafe, one of the best known licensed restaurants of this city, changed hands. Haas, the defendant, sold and delivered possession to Rosar, the garnishee, and the license was transferred sec. leg. The sale passed title to the lease, trade, good will, furniture, fixtures and supplies on hand. There was no attempt on part of the purchaser to comply with the requirements of the act of 1905, and the attachment followed at the suit of these plaintiffs who were creditors of Haas. The sheriff seized a quantity of cigars and three cash registers.

The question is whether such property is within the scope of the statute, and is largely one of first impression. That is to say, neither of the appellate courts seem to have had occasion to consider it. The only consideration it has received, so far as I can find, appears to have been in the common pleas of Butler county, cited below.

However, it is safe to say that the business of a licensed eating house and restaurant is not merchandising in any legitimate sense of the term; and that it is the stock and equipment of the merchant at which the regulation of the statute is distinctly aimed. It is "the sale in bulk of the whole or a large part of a **stock of merchandise and fixtures, or merchandise or fixtures** (black-face ours) otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business" that is made voidable at the suit of a creditor without notice. If it was intended to apply to the sale of a public house and the supplies kept on hands for the entertainment of its guests, the terms used are very inapt; and to extend their meaning by mere force of construction so as to include such property would in my judgment be unwarranted by the nature and character of the legislation. The function of a house of public entertainment is somewhat analagous to that of a liveryman, drayman and teamster. It has been held that the vehicles, harness and other equipment used in such business do not constitute a stock of merchandise within the meaning of the statute: *Miller v. Lincoln*, 63 Pitts. 700.

But the precise question, at least so far as concerns the furniture and fixtures of a hotel, was at issue in the case in Butler county, above referred to, where it was held that they were not within the act: *Kemp, et al., v. Corbin & Co.*, 22 Pa. D. R. 215. While this is not binding, it is the deliberate conclusion of a competent court and as such is persuasive. True, in the present case one might distinguish between the status of the cash register and that of a quantity of cigars; but the distinction would be arbitrary. For while it is conceivable that the same proprietor might carry on a mercantile business under the same roof and in connection with his hotel, yet in the absence of a mixed enterprise of that kind, the practical difference between the two is so characteristic that it would be wholly fanciful to say that the inn-keeper combines the two merely because he has on hand a stock of cigars to supply the wants of his guests. That must be regarded as only an incident of the business, and not its ear-mark of identity.

It is believed that the property in question here is not within the purview of the act. The rule to show cause is accordingly made absolute and the attachment dissolved.

COMMONWEALTH v. WILLIAM SAVITCH.

Justice's Court—Record—Summary Conviction—Cruelty to Animals—Act 29 March, 1869, P. L. 22—Proceeding Coram non Judice—Certiorari.

On certiorari judgment and imposition of fine for cruelty to animals under Act 29th March, 1869, P. L. 22, will be reversed and restitution ordered, where the record shows that defendant's wife, during the alderman's absence, entered a plea of guilty and paid the statutory fine and costs to an officer in charge.

The Act of 1869 makes no provision for "entering a plea;" and nothing short of a confession by defendant himself properly shown on the record, can be considered as a plea of guilty which will sustain a conviction.

An alderman is without personal cognizance of any proceeding which takes place during his absence, and he can therefore make no return of such proceeding which will have the status of an official record.

Certiorari. In the Court of Common Pleas of Lackawanna County. No. 26, March Term, 1916.

E. E. Merrifield, for Commonwealth.
L. M. Levy, for Defendant.

Newcomb, J., June 26, 1916. The writ was taken to test the legality of a fine imposed by a magistrate on summary proceedings of very unusual character. Ostensibly the case arises under the Act of March 29, 1869, P. L. 22, Sec. 1, defining the offense of cruelty to animals. On the face of the return there was a warrant founded on information charging that defendant "did wantonly and cruelly ill-treat and abuse a red cow and a black cow by keeping them in a barn that was too small to house the said animals without jeopardizing their health. Also being poorly ventilated, having no drain, said cows being compelled to stand and lie in their own manure without bedding of any kind."

The lack of ventilation and drainage, as appears by the transcript, refers to the barn.

Two records—so-called—were made up in the alderman's docket; the one immediately after the proceedings were had; the other upwards of two weeks later after service of this writ. There is a substantial conflict between the two except in one particular. They agree as to the fact that the proceeding resulted in the payment of a fine together with costs.

As might be expected, the parties have had recourse to proofs aliunde; but the work was superfluous.

Each of the two records is bad, and taken together they are worse. One point of conflict is as to the presence of defendant. No one had taken the trouble to arrest him, and he doesn't appear to have had any knowledge of the proceeding until after the fine had been collected. His wife presented herself on some sort of notice and it is undisputed that she paid the money to secure the husband's immunity from arrest. The first record says he was "brought in" and a hearing had. Admittedly this is untrue; but at that, it is not apparent how the alderman could claim any particular advantage in that behalf as he himself was not "brought in." This is shown by the return now made which both he and the Commonwealth insist is the true record. Appellant can risk nothing by taking them at their word. As to what is then alleged to have happened the recital is as follows: "Defendant's

wife appears at my office in behalf of said Wm. Savitch and desired to enter a plea of guilty of the aforesaid charge and demanded to know the cost of settling the same. I being temporarily absent, the officer in charge communicated with me over the telephone asking what should be done. I directed said officer to inform said Mrs. Savitch that there could be no settlement other than that provided by law which would be a fine of ten dollars and costs, whereupon the said Mrs. Savitch voluntarily deposited in the hands of said officer ten dollars fine and \$4.84 cost, which was duly paid to me," etc.

Having been without personal cognizance of the matter, the alderman can make no return having the status of an official record. Hence, if essential to a proper disposition of the case his recital both as to the "plea" and the "voluntary" payment of the money would not be immune from attack by extrinsic proof. But the inquiry is unnecessary. The proceeding was fatally defective from any point of view. Looked at from the standpoint of the alderman's absence it was *coram non judice* and, therefore, void. Waiving that and assuming he was present, for the sake of discussion it may be granted that a valid conviction could be founded on defendant's confession. It is only as a form of confession that a magistrate, however mindful of what is "provided by law" can consider a plea of guilty; and even then he must show what took place. Whether there was anything amounting to such plea is a legal conclusion arising out of what was made known to the accused on the one hand, and his answer on the other; and the particular facts must appear, not the alderman's mere conclusion on the subject. His jurisdiction in the premises, being special and limited, must be exercised in strict conformity with the statute by which it is conferred. That makes no provision for "entering a plea." It provides only for conviction. One who offends "shall be deemed guilty of a misdemeanor, and on being convicted thereof" (black-face ours) "shall be fined by the said alderman," etc. That, and that alone, defines the condition precedent to the lawful imposition of the penalty. Like all penal statutes it is subject to the rule of strict construction. So even had both defendant and magistrate graced the occasion with their presence the record here would not

support the fine.

But, says the commonwealth, it was voluntarily paid, and that was conclusive; hence, a motion to quash.

This takes the record at more than its face value and thus begs the question. It certainly wasn't paid either voluntarily or otherwise by defendant who is the party affected by the proceeding. If it be granted that the accused in such case may appear and confess the charge by mouth of an agent, and that his wife may act in that capacity, it would undoubtedly have to be an actual and not merely a constructive agency. It follows that he who has occasion to assert the validity of a fine imposed in that way would have the burden of affirmative proof both as to the existence of the agency and its extent. That burden would not be sustained by what appears here where the only link connecting defendant with the transaction is the fact that he sued out this writ which goes in disavowal of any agency.

But what shall be said of the agent by whom the court was represented? The alderman speaks of the services of "the officer in charge" as a very commonplace incident. But judicial functions cannot be delegated. As authority for his motion, the learned counsel relies on *Com. v. Gipner*, 118 Pa. 379, which is not at all in point. It had to do with a conviction regular in all respects. It met the statutory requirements in both form and substance; and the fact that the fine had been voluntarily paid by defendant himself was not even in question.

Last, though perhaps not least, it may be doubted whether the matters alleged in the complaint constitute an offense against the act of 1869. Only wanton acts of cruelty are covered by its terms, and the act described here would hardly seem to be of that character. The question is more sharply defined, however, by the facts appearing in another like case which went to trial before the same alderman, and the merits of the complaint need not be decided at this time.

For the manifest irregularities of procedure in this case the exceptions are sustained, the judgment is reversed and restitution ordered.

MARTIN v. CRAMER.

Landlord and Tenant—Repairs—Rent.

There is no implied covenant arising out of the relation of landlord and tenant whereby the landlord warrants that the leased premises shall be tenantable, nor is it implied thereby that the landlord undertakes to keep the premises in such condition. Therefore it is no defense in an action for rent that the demised premises were not in tenantable condition in the absence of a provision in the lease for repairs by the lessor.

The tenant cannot relieve himself of his covenant to pay rent by moving out and delivering the key to the landlord's agent unless he can show that the landlord accepted the key and released him. The fact that the landlord put up a notice and endeavored to rent the house does not lessen the defendant's liability.

Where the signing of a lease was induced by a contemporaneous agreement to make the house habitable, but no continuing promise to repair is shown, the tenant is not excused from liability for rent because the landlord refused to make repairs which became necessary after he had moved in.

In a suit for five months' rent due against a tenant who, after paying for seven months, removed from the premises, an affidavit of defense is insufficient which avers that when the lease was executed the plaintiff promised to make any repairs that should be found necessary to put the house in a tenantable condition, and that some time after the tenant moved in water came through the walls and the plaintiff failed, on notice, to make the necessary repairs, where the affidavit does not allege a continuing promise to repair or that the premises were not in tenantable condition when the defendant moved in.

Rule for judgment for want of a sufficient affidavit of defense. C. P. of Lancaster Co. May Term, 1916, No. 36.

John B. Graybill, for rule.
D. McMullen, contra.

July 8, 1916. Opinion by Landis, P. J.

The plaintiff's statement asserts that, on January 29, 1915, the plaintiff entered into a written lease with the defendant, whereby, in consideration of the sum of \$174.00, he, the plaintiff, leased to the defendant a property, numbered No. 250 Reservoir Street, in Lancaster City. A copy of the lease, which is thereto attached, shows that the term began upon the signing of the lease and was to continue for one year, and that the rent was to be paid in monthly installments of \$14.50 each. It is admitted that the defendant paid on account thereof \$101.50, that is, the rent to August 29, 1915, and that the

amount at the present time claimed to be due by the plaintiff is \$72.50, with interest.

By the affidavit of defense, the defendant admits that he executed the lease, but he alleges that the plaintiff promised him that any repairs that might be necessary to put the house in tenantable condition would be made, and that, when the plaintiff had prepared the lease, the defendant signed it upon the express condition that if any repairs should be found necessary, the plaintiff would have them made. It is alleged that the defendant moved into the premises on February 4, 1915, and that, some time thereafter, the particular dates of which are not specified, he found, in heavy rains, the water at the angle between the main and back buildings came in through the walls and stood in drops on the inside, and that, in four rooms of the house, the walls became so damp and wet that they were mouldy, and that water also ran down on the inside of a bay window located in the front part of the house in considerable quantities. He asserts that he notified the plaintiff to have these necessary repairs made, but the plaintiff failed to do so, and that, thereupon, he gave the plaintiff notice that he would move on September 1; that about that time he did move, and upon so doing he delivered the keys to the plaintiff's place of business. He also asserts that, about the middle of August, the plaintiff put up a sign for rent on the house. These are practically the facts upon which he relies as a defense to the present action.

The law is, that there is no implied covenant arising out of the relation of landlord and tenant, whereby the landlord warrants that the leased premises shall be tenantable, nor is it implied thereby that the landlord undertakes to keep the premises in such condition. Therefore, it is no defense in an action for rent that the demised premises were not in tenantable condition. *Reeves v. McComeskey*, 168 Pa., 571. In *Jackson v. Stewart*, 31 Sup., 58, it was alleged that the demised building was not habitable and the defect complained of was dampness. *Henderson, J.*, in the opinion of the Court, said: "After having had an opportunity to inspect the premises, the appellants are not in a situation to complain that the location of the house was such as to create dampness; nor does the statement of the agent that he thought the

dampness discovered by one of the defendants was owing to the fact that the house had been closed, relieve the defendants from the responsibility imposed upon them by the examination made. There being no provision in the lease for repairs by the lessor, a tenant cannot defend against the payment of rent on the ground that the premises are not in a tenantable condition: *Kline v. Jacobs*, 68 Pa., 57; *Huber v. Baum*, 152 Pa., 626. If the dampness was due, as alleged by one of the defendants' witnesses, to 'a very heavy rain in the summer and the water settled at the front of the house and at the back of the house,' the condition was one for which the landlord was apparently not responsible and one which the defendants might as easily anticipate as the owner. The defendants leased with their eyes open as to the location of the house, and it does not appear from the evidence that its condition changed after the execution of the lease, except as it may have been affected by the heavy rain referred to." It was also held in that case that "the defendants did not relieve themselves from their covenant by leaving the key of the house at the office of the plaintiff's agent;" that, "if the landlord had accepted the key, such act would have amounted to a dissolution of the tenancy, unless he informed the tenants that he would hold them for the rent;" but, as in the case now before us, there was no evidence that the key was accepted or that the landlord released the tenants. In *Moore v. Weber*, 71 Pa., 429, it was also held that "there is no implied obligation on the landlord to repair; nor does he undertake that the premises are fit for the purposes for which they are rented, that they are tenantable or shall continue so." As there is no covenant in this lease for repairs to be made either at the time of entry or subsequently, it would, therefore, appear on the face of the papers that, under the law, the rent claimed is due and owing by the defendant.

Is, then, this situation changed by the allegation that the house would be put in tenantable condition, or that, if repairs should be found necessary, the plaintiff would have them made? It has been decided that a contemporaneous parol agreement made at the time a written agreement is entered into, which is the inducement for the signing of the written agreement, is good between the

parties, and that the violation of such contemporaneous agreement is a defense in an action brought upon the written agreement. *Gandy v. Weckerly*, 220 Pa., 285; *Martz v. Wilcox Company*, 57 Sup., 169; *Miller v. Fry*, 57 Sup., 473; *Huye v. Leed*, 32 *Lanc. Law Review*, 377. If that principle applies in the present case and the allegations as to the parol agreement are sufficient, it would follow that the rule must be discharged. I do not, however, think that it covers this case. The words of the affidavit of defense are uncertain in their application, and seem to me to set forth, not a continuing promise to repair at all times during the term of the lease, but a promise that if, upon the defendant's entry on the premises, repairs were necessary to render the house habitable, the plaintiff would make them. There is no allegation that the house was in an uninhabitable condition at that time, or in fact that any repairs were then necessary for its occupancy. If the house was then in a tenantable condition and there were then no repairs found necessary, the fact that subsequently the water came in is not a sufficient defense. Again, the mere fact that water came into the house on occasions of heavy rain afterwards does not show such lack of repairs as would enable the defendant to cancel the lease. Every one knows that bricks are porous, and, in heavy rain, under some circumstances, water comes through the heading courses of the ordinary nine-inch wall. If it does, it is bound to leave dampness behind. The only remedy for this is, not repairs, but either the rebuilding of the wall or the stripping and replastering of it. But surely no sensible person would contend that such a burden is imposed upon a landlord, unless he specifically assumes it.

Nor does the fact that the landlord put up a notice and endeavored to rent the house lessen the defendant's liability. If, by so doing, he attempted to save the defendant from loss, I do not see upon what ground the latter can complain. In *Reeves v. McComeskey*, *supra*, it was held that "the putting of a bill 'for rent' or 'for sale' on premises vacated by a tenant before the expiration of his term does not deprive the landlord of his right to collect the rent until the expiration of the term."

It appears to me that the affidavit of defense is insufficient, and for this reason the rule should be made

absolute. This is accordingly done, and judgment is entered in favor of the plaintiff for \$72.50, with interest from February 11, 1916, making \$74.40.

Rule made absolute and judgment for plaintiff and against defendant for \$74.40.

COMMONWEALTH v. MAX ECKER.

Justice's Record—Summary Conviction—Cruelty to Animals
—Act 29th March, 1869—Certiorari.

In order to sustain a conviction under act 29th March, 1869, P. L. 22, which makes it a misdemeanor to "wantonly or cruelly ill-treat, overload or otherwise abuse any animal," etc., a lawless act of defendant and consequent injury to or suffering by the animal must be alleged and affirmatively proved.

That defendant's cow, at the time of witnesses' visit, a winter morning, was housed in a small building which was not in proper condition as to cleanliness, ventilation and drainage, does not constitute an offense against the statute, where there is no evidence, either direct or circumstantial, of any ailment or physical discomfort suffered by the animal, and nothing to suggest wanton cruelty.

Wanton cruelty necessarily implies an act not only inhuman in its nature, but essentially lawless in practice or manner of perpetration. A lawful act, though liable to inflict pain and suffering upon an unoffending animal, is not wanton.

The statute gives an alderman no authority to impose a sentence of imprisonment. The only penalty is a fine, in default of payment of which the convict may be taken in execution by his body and thus detained in jail until discharged by due course of law.

Certiorari. In the Court of Common Pleas of Lackawanna County. No. 770, January Term, 1916.

E. E. Merrifield, for Commonwealth.

L. M. Levy, for Defendant.

Newcomb, J., June 28, 1916—By proceedings had under the act of 29th March, 1869, P. L. 22, defendant was convicted of cruelty to animals. Thereupon he was sentenced to pay a fine and costs, and in default thereof to undergo imprisonment of thirty days in the county jail.

This was error. The statute gives the alderman no authority to impose imprisonment either for thirty days or thirty seconds. The only penalty is a fine. If that is not forthcoming, however, the convict may be taken in

execution by his body and thus detained in jail until discharged "by due course of law." That is one thing; a sentence to imprisonment, a very different thing.

If there were nothing else, the defect could be treated as merely formal and the proceeding put in shape by remitting it for amendment. But there is a more serious objection which goes to the merits, and is believed to be fatal.

On the face of the complaint itself it would seem to be doubtful whether the facts alleged constitute an offense against the statute. That impression is confirmed by what appeared at the hearing.

The clause of the act upon which the case must stand or fall makes it a misdemeanor to "wantonly or cruelly ill-treat, overload or otherwise abuse any animal," etc.

It is set out in the information that at his premises in the borough of Taylor defendant did "wantonly and cruelly ill-treat and otherwise abuse a cow by keeping her in a shed that was too small to house the animal without jeopardizing her health. Said shed being in a filthy condition. Without ventilation and no drain. Said cow was compelled to stand and lie in its own filth. No bedding." The complaint was neither made nor supported by anyone in or on behalf of the borough, but by certain functionaries attached to the alderman's office in this city. This has provoked counsel to a somewhat spirited criticism impugning the motive underlying the prosecution; but with that this writ has no concern.

As might be anticipated from the character of the complaint, what developed on the trial was a dispute as to defendant's care of his stable. It was visited by the two witnesses on one occasion, and that on a winter morning. Their knowledge of the subject was, therefore, limited. There was no evidence, either direct or circumstantial, of physical discomfort to say nothing of any ailment suffered by the animal. What is more, there was nothing to suggest wanton cruelty. At its maximum the proof could be said to show that for the use of himself and family defendant, like many others of his apparent station in life, keeps a cow; and that his stable is not so commodious and well appointed as might be, though such as corresponds with his circumstances.

Wanton cruelty necessarily implies an act not only

inhuman in its nature, but essentially lawless in practice or manner of perpetration. A lawful act though liable to inflict pain and suffering upon an unoffending animal is not wanton. The point finds illustration in *Com. v. Lewis*, 140 Pa. 261, growing out of the practice of trap-shooting. It was there held that so long as the sport was lawful, the fact that wounded birds escaped and necessarily suffered until eventually captured and put to death, did not make out a case of wanton cruelty against the sportsman. Much less could it be so in an instance like this where neither a lawless act of defendant nor consequent injury to or suffering by the animal is present, both of which must be made to appear in order to justify a conviction. The mere fact that on the occasion of their visit the witnesses didn't find the stable clean, nor large enough to suit their notions, may have been convincing to the alderman; but it doesn't satisfy the requirements of a penal statute which exacts affirmative proof, as well as allegation, of each and every element going to make up the offense of wanton cruelty.

Judgment reversed.

HEINDEL'S PETITION.

Judgment Note—Entry After Ten Years—Contemporaneous Agreement.

Petitioner, executor of M, averred that among testator's effects he found a duly executed judgment note in favor of the testator, on which there had been no payments of either principal or interest, and, as the date of execution was more than ten years ago, asked permission to enter the same of record. Respondent admitted the signature, but alleged a contemporaneous parol agreement by which the note was to be void when interest to its amount had been paid and averred such payment, producing some testimony to that effect. Held, that the rule to enter said judgment must be made absolute.

The function of an executor is to collect, convert and safely keep the assets of his decedent for the purpose of distribution among the parties beneficially entitled. It is his duty to obtain possession of all the estate due and belonging to the deceased, and, when needed, bring action for their recovery.

The evidence in support of the answer is of such a character that the Court would hesitate, without further investigation, in concluding that the note in question had been extinguished by the performance of an alleged contract.

These matters can only be determined by the submission of relevant facts to a jury.

In the Court of Common Pleas of York County. Petition of D. A. Heindel, executor of the last will and testament of Philip Mitzel, late of the Borough of Yoe, York County, Pennsylvania, deceased, requesting that a judgment confessed on a note found among the effects of decedent be entered of record.

A. C. Wiest for Petition.

W. A. Miller and Stewart & Gerber, Contra.

June 19, 1916. Ross, J. It appears by the petition that Philip Mitzel, of the Borough of Yoe, York County, Pennsylvania, died testate, on the 19th day of January, 1915.

On the 5th day of February, 1915, his will was probated, and letters testamentary were granted by the register of wills of said York County, to D. A. Heindel, the person nominated in the will as the executor thereof.

Among the effects of the decedent which came into the possession of said executor was a certain note made payable to the order of Philip Mitzel for \$965.00 with 5 per cent. interest without defalcation from its date. The note contained a confession of judgment for the above amount in favor of said Philip Mitzel, his survivors, administrators, and assigns, with costs of suit, and release of errors, against Lemuel S. Mitzel. The note was sealed, and was witnessed by D. Sterling Mitzel. The note was dated November 30th, 1891, and was payable sixteen months after date.

The petition alleged "That no part of the principal of said note was paid to the said Philip Mitzel, or to any one for him."

"That no interest on said note, which accrued after November 30th, 1911, was paid to said testator, nor to any one for him, nor to your petitioner, nor to any one for him."

"That the whole of said note, viz: \$965.00 with interest from November 30th, 1911, remains unpaid, and is justly and lawfully due and payable by said Lemuel S. Mitzel to your petitioner."

"That your petitioner has made demand on said Lemuel S. Mitzel for the payment of said note and interest, but he has utterly failed and neglected to pay the

same or any part thereof, other than as above set forth."

It is signed and sworn to by D. A. Heindel, the executor.

This application was made in compliance with the rules of this Court on page 37, Rule No. 2, which requires that "if a warrant of attorney to enter judgment be above ten years old and under twenty years, the Court in term time, or a judge thereof in vacation, must be moved for leave to enter judgment, which motion must be granted on an affidavit setting forth that the money is unpaid and the party living. But if the warrant be above twenty years old, there must be a rule to show cause served upon the party if he be found within the State."

On presentation of the petition, this Court granted a rule on the defendant, returnable on the first Monday of October, 1915, which rule was served, and the defendant answered the petition.

The answer practically admits the signing of the note and the confession of judgment and says "That on November 30th, 1891, the respondent executed and delivered to his uncle, Philip Mitzel, now deceased, the note attached to plaintiff's petition, with the distinct understanding and agreement that said note should never be entered of record; that in case of the death of Philip Mitzel, the note was to be 'null and void;' that as soon as the respondent, Lemuel S. Mitzel, paid the interest to the amount of the principal, the said note should be 'null and void.' "

"That your respondent has paid interest on said note to the amount of the principal thereof, as set forth in the second paragraph of plaintiff's petition, and made demand for the return of the said note, which the said Philip Mitzel promised to do when he found the same, and stated that the note had been mislaid and that he could not find it; that the said Lemuel S. Mitzel paid no further attention to the payment of said note as under the agreement it was paid in full, that Philip Mitzel was his uncle, and your respondent relied upon said contract, that when the interest amounted to the principal, the said note was 'null and void.' "

The allegations of the answer were supported by the testimony of D. Philip Mitzel, the person who witnessed the signature of the note, who testified to an understand-

ing between Lemuel S. Mitzel and Philip Mitzel, at the time the note was signed, in substance that Philip Mitzel, the payee in the note, agreed with the defendant, that when the interest was paid amounting to the face of the note, the note would be "null and void."

We apprehend the rule of Court was made to prevent the improper entering of judgments that had been paid. The evidence in this case is such that we think it ought to be decided by a jury. The function of an executor is to collect, convert, and safely keep the assets, of his decedent for the purpose of distribution among the parties beneficially entitled. For this purpose he is invested by the grant of letters with the legal title, and its incidental rights in such assets as from the date of the death. It is accordingly his duty to make an inventory and obtain possession of all the estate due and belonging to the decedent, and when needed, bring action for their recovery; Charlton's Appeal, 34 Pa. 473; Jos. Milleisen v. Michael Senceman, 4 Pa. Sup. Ct. 455; Souder's Estate, 169 Pa. 239; Hawkin's Orphans' Court Principles and Practice, page 126, Sec. 122.

The executor seems to have performed his part of the duty imposed upon him by law, and the evidence taken in support of the answer filed is of such character that the Court would hesitate, without further investigation, in concluding that the note in question had been extinguished by the performance of an alleged contract made contemporaneously with the note, as an inducement for the defendant's signature. These matters can only be determined in a proper way by submission of relevant facts to a jury.

The rule is made absolute and the petitioner is allowed to enter judgment in the prothonotary's office.

TONER ESTATE.

Trusts—Negligent Trustee—Annulment of Trust Estates—Acts of April 24, 1828, P. L. 222 and May 23, 1895, P. L. 114.

Where by petitions and exceptions it is sought to annul a charitable trust created by will so that all the moneys and all the assets shall be taken out of the hands of the trustee solely on the ground of mismanagement and distributed to and among the heirs and next of kin and to destroy such charity established by a testator because of

alleged misfeasance, to the end that the funds and assets of the charity will be distributed to the next of kin, it was held that even conceding mismanagement, or for any other reason, the trust cannot fail so that the next of kin of the donor may have the trust funds distributed among themselves.

Where, under such a trust the will of the donor made no positive declaration prohibiting the sale of the trust property and the purchase of other trust property with the proceeds, it was held that a sale under such circumstances is not a diversion of the property from the purposes for which it was intended by the donor, but is regarded only as a conversion of the property so that it can be more usefully applied in some other way than that mentioned in the instrument creating the trust. The fact is that this is more effectively putting the trust in the way of continued usefulness and longer duration.

It is not in the power of a negligent or inefficient trustee to break down a trust. This can be corrected by an appeal to the Court and frequent appeals, if necessary, but there is no forfeiture and no escheat for negligence or inefficiency on the part of the trustee.

The Courts of Common Pleas have authority to appoint a trustee of a charitable trust without consent or leave of the Attorney General under the Act of April 14, 1828, P. L. 222, notwithstanding the provisions of the Act of 23 May, 1895, P. L. 114.

In the Orphans' Court of Westmoreland County. Petition and exceptions filed to Nos. 167 May Term, 1913, and 59, 69 and 80 November Term, 1914, which seek to vacate orders and decrees and set aside the trust under the will of James L. Toner, deceased, and distribute the trust funds to and among the next of kin.

John B. Brunot and G. W. Williams for Petitioners and Exceptants.

Moorhead & Smith, Contra.

Copeland, P. J. James L. Toner, late of Derry Borough, Westmoreland County, Pennsylvania, died testate on the 6th day of January, 1899, having first made his last will and testament in writing, which was duly probated on the 10th day of January, 1899, and recorded in the Register's Office of Westmoreland County, in Will Book, Volume 10, page 372, by which will he devised and bequeathed, inter alia, as follows: "Tenth. All the residue and remainder of my estate of every kind and wherever situated. I give devise and bequeath to the Benedictine Society of the Catholic Church in America, one portion of said residuary estate will consist of my farm near Derry Westmoreland County Pennsylvania * * *. Containing one hundred (100) acres more or less, and upon it I direct that the Benedictine Society shall

erect and set up suitable buildings and establish a school of an industrial character for the training and education of boys to qualify them to perform skilled manual and clerical labor. This school shall be known as the Toner Institute and shall be under the management of said Society * * * * desiring that the other portion of my residuary estate shall be used, along with other funds if any can be obtained in the erection of suitable buildings and in the proper equipment of said school. * * * Eleventh: I hereby authorize and empower my executors hereinafter named during the lifetime of my said wife to sell and convey any portion of my real estate, except the farm above mentioned either at private or public sale, and to execute and deliver to the purchaser or purchasers good and sufficient deeds in fee simple upon such terms and at such times as they may deem most advantageous for my estate. * * * * If the said real estate should not be sold in the lifetime of my said wife and the proceeds thereof should not be needed to pay the general legacies afore mentioned or the expenses and costs—connected with the settlement of my estate, then I direct that such unsold real estate shall pass to the said Society to be held used and sold by it or its successors and assigns as it may deem best.” * * * * Third paragraph of the first codicil: “Third: In case the Benedictine Society of the Catholic Church shall not accept the bequest and devise mentioned in the tenth paragraph of my said will, then the same is given bequeathed and devised to the Catholic Diocese of Pittsburgh for the same purposes as mentioned therein and no other.”

The Benedictine Society, on the 17th day of April, 1899, as recorded in Administration Docket No. 8, of Westmoreland County, Page 63, filed its declination to accept the devise and bequest contained in the tenth paragraph of the will of the testator, and thereafter to wit, on the 6th day of January, 1900, the Right Reverend Richard Phelan, then Bishop of the Roman Catholic Diocese of Pittsburgh, filed an acceptance in lieu of the Benedictine Society as provided by the testator in the third paragraph of the first codicil of his will.

On the 28th day of November, 1910, at No. 128 February Term, 1911, the Right Reverend Regis Canevin, Bishop of the Roman Catholic Diocese of Pittsburgh, suc-

cessor to Bishop Phelan, was appointed, by a decree of the Court of Common Pleas of Westmoreland County, trustee of the trust provided in the tenth paragraph of the first codicil of the will of the late James L. Toner, deceased. To this order or decree of the Court of Common Pleas, a petition was filed by Joseph F. Layton, Miss Nancy J. Layton and Edward Joseph Layton, in the ninth paragraph of which it was averred, that the order or decree was invalid, because the same was filed without leave of the Attorney General of this Commonwealth, and without notice to that officer, therefore the trustee was without authority to act, and being without authority to act the trust failed and the funds in the hands of the trustee now should be distributed to the heirs and next of kin of the testator. This petition was filed at No. 80 November Term, 1914, Orphans' Court. As may be observed from the tenth paragraph of the will, the testator, at the time of his death, was seized, inter alia, in his demesne as of fee of a farm situate in Derry Township, Westmoreland County, Pennsylvania, adjoining lands of Peter Loucks, Daniel Kist and heirs of John Toner, containing one hundred (100) acres more or less. It was this tract of land which, in the testator's residuary estate, devised to the Benedictine Society of the Catholic Church in America, the testator directed the establishment of a school of an industrial character for the training and education of boys to qualify them to perform skilled, manual, and clerical labor, and it is over this tract of land the principal part of this litigation arises.

After Bishop Canevin was appointed trustee, for the Catholic Diocese of Pittsburgh, Pennsylvania, of the various lots and pieces of ground, situate within the Borough of Derry, this county, which the testator devised as set forth in that portion of the will and codicil heretofore quoted, he presented his petition at No. 128 February Term, 1911, Orphans' Court, as trustee, praying for an order to make private sale of the coal underlying forty-six (46) acres of the one hundred acre farm, upon which the testator directed the Toner Institute to be located, to the Ligonier Coal Company, a corporation, for the sum of \$68,250.00. On the 27th day of February, 1911, an order was made by the Court granting the prayer of the petition. To this order there was filed by Joseph

F. Layton, Miss Nancy J. Layton and Edward Joseph Layton, a petition, at No. 80 November Term, 1914, Orphans' Court, to the effect that the petition of Bishop Canevin set forth, inter alia, "that the said seam of coal can be mined and removed without injury, inconvenience to, or interruption of the use of the said Toner Institute for the purpose set forth in said trust" and that to the petition of Bishop Canevin there were attached affidavits of three persons stating, "that the sale of coal thereunder will not impair the value of the farm for the uses of said institute, etc. * * * * We know the same (said farm) is used under the will of Dr. J. L. Toner as a home or school for boys, and we believe that the sale of the coal thereunder will in no way affect or impair the value of the said farm, for the use and purposes of said school" * * * that this averment in the petition and the affidavits were material averments, and that they related to matters which the trustee was bound to know and that he, the trustee, is not entitled to any benefit or advantage from an order founded upon such erroneous averments as they afterward turned out to be.

At No. 167 May Term, 1913, Orphans' Court, in his capacity, as trustee, by virtue of his appointment heretofore referred to, Bishop Canevin presented a petition setting forth that he had \$77,525.00 in cash and securities belonging to the trust of which he was appointed trustee, and that since the sale of the coal under the above described tract of land, the same was being removed rapidly, which allowed the surface to fall in, in a great many places, cracking the earth up to the buildings of the Toner Institute, making them untenable and dangerous to life and impossible to safely continue the school on the farm, and that it is absolutely necessary that the school should be moved elsewhere and praying for an order that he, as trustee, be authorized to select a suitable piece of ground to erect and set up suitable buildings thereon, for the purpose of continuing the trust created by the will of the testator. On the 5th day of July, 1913, the Court ordered and decreed that the prayer of the petition be granted. To this order Joseph F. Layton, Nancy J. Layton and Edward Joseph Layton, on the 5th day of December, 1914, at the same number and term in which they aver that if the averments of the petition of

the trustee at No. 128 February Term, 1911, Orphans' Court are correct to wit: That the coal could have been removed from the said Toner Farm without causing any injury or damage to said Institute, then said trustee was guilty of such negligence in not seeing that said coal was so removed as to demand the vacation of the order. Further that if, on the other hand, the coal could not have been so removed without producing such injury, as is averred in the trustee's petition, at the present number and term, then the trustee was negligent in not having ascertained that fact before the presentation of the petition at No. 128 February Term, 1911, and was so negligent as to demand the vacation of the order, and that therefore these matters justify and demand a decree, declaring the trust at an end and a distribution of the trust funds among the heirs and next of kin of the testator, and so pray.

At No. 230 May Term, 1913, Orphans Court a petition was filed by Bishop Canevin, as trustee, setting forth that the heirs of the testator were alleging that he had failed to carry out the testator's will, and were threatening to bring suit of ejectment and filed bills of accounting, that he deemed it advisable to compromise with the alleged heirs for a reasonable sum, and that he believed he could compromise with them for a sum not exceeding twenty-five thousand (\$25,000) dollars and prayed that such an order be granted that would empower him to compromise and settle their alleged claims and leave him, as trustee, free to proceed with the execution of the trust, unharrassed by threats of litigation. On the 5th day of July, 1913, an order and decree was made, authorizing Bishop Canevin to expend a sum not exceeding twenty-five thousand (\$25,000.00) dollars for the purpose set forth in the petition. In the petition of Joseph F. Layton, Nancy J. Layton and Edward Joseph Layton, filed at No. 80 November Term, 1914, Orphans' Court, they allege that no such settlement or compromise was ever made, and, therefore that order should be vacated and annulled.

At No. 69 November Term, 1914, Orphans' Court, Bishop Canevin, as trustee, filed another petition, setting forth that certain land in Allegheny County, Pennsylvania, had been dedicated for the use and purpose of the Toner Institute; that buildings were erected thereon, at

an approximate cost of Eighty Thousand (\$80,000.00) Dollars, that he had no sufficient funds in his hands, and that it was necessary for him to borrow the sum of fifteen thousand (\$15,000.00) Dollars for a period of three years, with interest, to fully pay the cost of the construction of buildings.

On the 21st day of November, 1914, an order was made, authorizing the trustee to borrow the sum of fifteen thousand (\$15,000.00) Dollars on mortgage, as the Orphans' Court of Allegheny County may direct. To this order at No. 69 November Term, 1914, Orphans' Court, Bishop Canevin, as trustee, filed another petition, setting forth that certain land in Allegheny County, Pennsylvania, had been dedicated for the use and purpose of the Toner Institute; that buildings were erected thereon, at an approximate cost of Eighty Thousand (\$80,000.00) Dollars, that he had not sufficient funds in his hands, and that it was necessary for him to borrow the sum of fifteen thousand (\$15,000.00) Dollars for a period of three years, with interest, to fully pay the cost of the construction of the buildings.

On the 21st day of November, 1914, an order was made, authorizing the trustee to borrow the sum of fifteen thousand (\$15,000.00) dollars on mortgage, as the Orphans' Court of Allegheny County may direct. To this order at No. 69 November Term, 1914, Orphans' Court, a petition was filed by Joseph F. Layton, Nancy J. Layton and Edward Joseph Layton, on the 5th day of December, 1914, praying that the same be vacated, on the ground that the legality of the proceedings at No. 167 May Term, 1913, Orphans' Court, has been attacked, and that if that proceeding is unlawful and illegal, which permitted these trust funds to be transferred and invested in Allegheny County, then the mortgaging of real estate, purchased by these trust funds, would also be illegal.

At No. 59 November Term, 1914, Orphans' Court, Bishop Canevin, as trustee, presented a petition to sell, at private sale, certain real estate belonging to the estate of the testator, situate in the Borough of Derry, to John P. Toner for the sum of twenty-five hundred (\$2500.00) Dollars. On the 14th day of November, 1914, an order of Court was made permitting the sale as prayed for in the petition. To this order exceptions were filed on the 30th

day of November, 1914, by Edward Joseph Layton, Nancy J. Layton and Joseph F. Layton, praying that the same be dismissed, on the grounds that the proceeding was invalid and contrary to the Act of Assembly and Rules of Court, in that it failed to set out the names of the persons interested in the estate under the testator's will; that it failed to set out the amount of the personal estate of the testator, together with the just and true account of all the debts of the testator; that it failed to set out a statement of all the real estate of the testator; that it failed to have attached proof of service or acceptance of service of notice by persons interested as heirs, legatees or devisees in the real estate, etc.

At No. 80 November Term, 1914, Orphans' Court there was filed, on the 5th day of December, 1914, by Joseph F. Layton, Miss Nancy J. Layton and Edward Joseph Layton, a petition for a decree to set aside the trust, etc., in which a review of all the legal proceedings from the creation of the trust to the time of filing the petition is set forth, and it is therein averred that the purposes of the trust or charity created by James L. Toner, the testator, have failed, been violated, and made impossible of performance, and then pray as follows:

"First: That your Honorable Court will order or decree that said trust or charity has failed, been violated and made impossible of performance by the acts of the trustee set forth in this petition. Second: That the appointment of the trustee, at No. 128, February Term, 1911, of the Court of Common Pleas of this county is invalid, and is not in accordance with the Acts of Assembly of May 23rd, 1895, P. L. 114. Third: That under the will of James L. Toner, no valid sale of any lands owned by said decedent and situate in Westmoreland County, Pennsylvania, or of any estate or interests in said lands could be made by any one excepting only the executors named in said will, or the survivor of said executors; and that said executors themselves, or the survivor of them, have under the terms of said will, no power or authority to sell said farm or any estate or interest therein. Fourth: That the order of Court made at No. 69 November Term, 1914, authorizing the said trustee to borrow upon mortgage the sum of fifteen thousand (\$15,000.00) dollars in Allegheny County, Pennsylvania, be vacated, as prayed

for in the petition filed by your petitioners at said number and term. Fifth: That the order of this Court made at No. 167 May Term, 1913, authorizing the removal of the trust funds to Allegheny County, Pennsylvania, and the use of the same there etc., be vacated and set aside for the reasons set forth in petition and in the petition filed at said number and term by your petitioners herein. Sixth: That your Honorable Court enter an order or decree that the trust under the will of James L. Toner, deceased, be declared at an end, and be vacated and annulled, and that the said Right Reverend Regis Canevin be directed to account for and pay over all of said trust assets and properties in his hands or under his control, and that the same be awarded to and paid over to the executors, or the survivors, of the estate of the said James L. Toner, for distribution among his heirs and next of kin."

It is perfectly clear to us, that the chief aim and purpose of all these petitions and exceptions filed, at No. 167 May Term, 1913, No. 59 November Term, 1914, No. 69 November Term, 1914, and No. 80 November Term, 1914, to the orders and decrees of the Orphans' Court, arising under the will of James L. Toner, the testator, in relation to the trust created thereby, are to annul the trust created by the testator and known as the Toner Institute, so that all the moneys and all the estate of every description shall be taken out of the hands of the trustee, solely on the grounds of mismanagement, and distributed to and among the heirs and next of kin of the testator.

The petitions at Numbers 59 and 69 of November Term, 1914, are aimed at two special proceedings in the Orphans' Court, the first to sell real estate in the borough of Derry, and the second to mortgage certain real estate in Allegheny County. The petition at No. 167 May Term, 1913, and No. 80 November Term, 1914, strike at the root of the trust and seek to destroy an established charity because of alleged misfeasance to the end that the funds and assets of the charity will be distributed among the petitioners and others who are next of kin.

There are questions of fact raised by these petitions and exceptions, but as we view the legal questions raised, we think an investigation now of the questions of fact would serve no useful purpose.

The first question raised, the legal phase of which

we will discuss, is the appointment of Bishop Canevin trustee of the charity created by the will of the testator. It is contended that this appointment is invalid, it not being in accordance with the Act of Assembly of May 23rd, 1895, P. L. 114, in that it appears from the record that the proceedings were not filed with leave of the Attorney General of this Commonwealth, nor was any notice given to that officer of the proceedings.

As we learn from the papers in these proceedings that Bishop Canevin succeeded Bishop Phelan, who accepted the trust for the Catholic Diocese of Pittsburgh, and who managed it until his death, and we further learn from the same source, that by virtue of his office as Bishop he is by the statutes of that Diocese vested in trust with the titles of the Congregations of the Diocese and the church property therein, it is therefore natural and reasonable, in the absence of any objection to his appointment, that he should be appointed trustee of the charity created by the will of the testator, in order that such action might be taken and such things done as would be essential to the successful administration of the affairs of the Toner Institute.

As we have just said, it is contended that the appointment of Bishop Canevin as trustee is invalid because the proceeding did not comply with the requirement of the Act of 23rd May, 1895, P. L. 114. This Act is an amendment to Section 10 of the Act of 26th April, 1855, P. L. 328, which provides that no charitable or other trust named therein, shall fail for want of a trustee, or by reason of indefiniteness, but that it shall be the duty of any Orphans' Court or Court having equity jurisdiction to supply a trustee under proceedings instituted by leave of the Attorney General of this Commonwealth. The purpose of the amendment of the Act of 1855, supra, by the Act of 1895, supra, was to extend the provisions of the Act of 1855, supra, to dispositions of property made prior to the passage of that Act. It is now contended that because the Attorney General did not join in the petition, the appointment of the trustee is invalid. We might say, in the first instance, in reply to this contention, that the petitioners and exceptants in these proceedings have no right to question such appointment, as they have no interest whatever in the testator's estate, and in the

second place that this objection to the appointment should be made to the Court where the appointment was made. The appointment of this trustee was made in the Court of Common Pleas, and the Orphans' Court is without jurisdiction to set aside a decree in that Court, but we need not rest our disposition of this contention on these propositions, though sound they are, when we have distinct and unqualified utterance of the Supreme Court of this State in a recent case, that the consent or leave of the Attorney General is unnecessary. The case to which we refer is that of petition of St. George's Church, 244 Pa. 410, wherein it is held that the Act of April 14th, 1828, P. L. 222, is still in force, and always has been, notwithstanding the Act of 26th April, 1855. The exact question, as we understand it, was ruled there, and it was held that a valid appointment of a trustee could be made by the Court of Common Pleas without the aid of the Attorney General. The Act of 1828, *supra*, applied originally to the Circuit Court and the District Court of the city and county of Philadelphia and the several Court of Common Pleas of the other counties of this Commonwealth and because it did not include within its terms the Common Pleas Court of Philadelphia, it was extended to them by Act of 21st of March, 1831, P. L. 193. We now quote from the opinion of Mr. Justice Mestrezat, in the case of St. George Church's Petition, *supra*. "For more than a half century since the passage of the Act of 1855, the Act of 1828 has been regarded by the profession and the courts as in full force and effect, and applicable in cases of vacancies caused by death of a trustee of church property as well as of other property in cases within the language of the Act."

The second legal question that arises out of these petitions and exceptions to the orders and decrees of this Court in relation to this trust, which we wish to consider, is:—Can this trust, conceding mismanagement by the trustee, (a fact by no means admitted) or for any other reason, fail so that the next of kin of the donor may distribute the trust funds among themselves?

It is a cardinal maxim in the Courts of Chancery upon this subject, that a trust will not fail for want of a trustee. It is said in Bispham Equity (2nd Edition) Section 136, that: "It is a cardinal maxim in Courts of

Chancery upon this subject, that a trust shall never be suffered to fail for want of a trustee." (See Perry on Trusts, Section 38.)

There is a long line of decisions of the courts sustaining this proposition.

In the case of *Barr v. Weld*, 24 Pa. 84, where a distinction was drawn between a trust and a conveyance on condition, Mr. Justice Lewis speaking for the Court said: "Where the intention is to dedicate property to charitable uses there is a difference between a conveyance on condition, and a conveyance in trust. In the first case the grantor and those claiming under him may enter for condition broken. But in the last they cannot, and the proper remedy for an abuse of the trust is an application to the chancery powers of the Court for an appointment of new trustees, or the means of compelling those already appointed, to execute the trust according to the intention of the donors."

In *Nauman v. Weidman*, 182 Pa. 263, there is a good illustration of the principle that a trust is not permitted to fail, for any reason, so that the next of kin can divide the trust property among themselves. Mr. Justice Mitchell in delivering the opinion of the Court said: "The plaintiffs in the ejectment had no claim at all. The suit was simply a discreditable scheme of greedy relatives to set aside the will of the testator by taking advantage of the well known unwillingness of the Mennonites to litigate. Courts, however, do not enter into consideration of the merits of claims which have been settled by compromise of actually existing litigation, and this case would be no exception on that ground, but the compromise passed no title to the present plaintiffs, because none of the parties had any title except the Kauffman Mennonite Association, and it had no power to convey. As already said the testator created a valid trust for specific charitable uses, and as a general rule, funds so held cannot be conveyed away by the trustee. In *Yard's Appeal*, 64 Pa. 95, Sharswood, J., quotes approvingly from Lewis on Perpetuities that 'land dedicated to the service of charity and religion is practically inalienable.' There are classes of cases where the object of the trust has come to an end, or conditions have so changed as to require change of location, etc., in which courts of equity

will decree sale and supervise the application of the proceeds to the same uses."

The question of the clearness and definiteness of the trust created in Dulle's Estate, 218 Pa. 162, was considered in an opinion by Chief Justice Mitchell, and it was indicated there again that next of kin could not avoid the will of a testator merely because they thought he had not expressed himself with sufficient certainty as to the charity intended, or because he vested large discretion in the executors the trust was not good. In that case we have this language from Chief Justice Mitchell: "It is argued that the conclusion is altered by the facts that the will created a trust and that the use of the word benevolent made the trust too indefinite to be enforced. The injustice as well as the illogical character of such argument is apparent. However doubtful what the testatrix did in fact want may seem, it is certain she did not want her estate to pass under the intestate law. To prevent that she appointed executors presumably familiar with her wishes, and invested them with ample discretion to distribute the estate 'having full confidence in (their) judgment, ability, integrity, and discretion.' Every element of certainty is potentially here, and yet for fear the executors thus informed and thus trusted might ignorantly or intentionally fail to do what she wanted done the court is asked to step in and do the one thing that it is absolutely certain she did not want, pass the estate under the intestate laws."

So it is quite clear that James L. Toner did not want his next of kin or collateral heirs, as he had no children, to have at least this portion of his estate.

In the case of *Hamilton v. John C. Mercer Home*, 228 Pa., 410, we have a like attempt of next of kin to take the trust estate because the trust itself, as they imagined, did not work successfully as it was expected by the testator it would. The opinion of the lower court in this case is reported in full and we now quote from it: "Gifts to charity have a public character. They are in relief of the commonwealth, and the latter has an interest in their maintenance. Wanting its assent, agreements between parties, that the trust may be divested and its capital become the private property of one of them, are incomplete and ineffective." * * *

In *Mormon Church v. United States*, 136 U. S. 1-59, Mr. Justice Bradley said: "The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well being of the people of the state. Hence, when such property ceases to have any other owner, by the failure of the trustee, by forfeiture for illegal application, or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the state; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court, the legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve and effect."

This case together with the others we have cited upon the subject we are now discussing, express the true doctrine as to whether trusts can fail and whether the trust funds can be divided among the next of kin. From these cases, it must appear to those who are interested that it is idle for the petitioners and exceptants in these proceedings to suppose that they can come in and take the trust funds and property in the possession and control of Bishop Canevin which came from the James L. Toner estate and part them among themselves and other collateral heirs. We have not even reached the doctrine of *Cy Pres* in this trust because, as we understand it, that doctrine is only invoked when everything which is in direct line with the trust and upon which it operates has failed, and then the trust will be perpetuated for purposes as nearly like that intended by the donor as possible. It is therefore to be seen that the Toner Institute must be annihilated or obliterated and every other educational institution of about the same class, or per-

an approximate cost of Eighty Thousand (\$80,000.00) Dollars, that he had no sufficient funds in his hands, and that it was necessary for him to borrow the sum of fifteen thousand (\$15,000.00) Dollars for a period of three years, with interest, to fully pay the cost of the construction of buildings.

On the 21st day of November, 1914, an order was made, authorizing the trustee to borrow the sum of fifteen thousand (\$15,000.00) Dollars on mortgage, as the Orphans' Court of Allegheny County may direct. To this order at No. 69 November Term, 1914, Orphans' Court, Bishop Canevin, as trustee, filed another petition, setting forth that certain land in Allegheny County, Pennsylvania, had been dedicated for the use and purpose of the Toner Institute; that buildings were erected thereon, at an approximate cost of Eighty Thousand (\$80,000.00) Dollars, that he had not sufficient funds in his hands, and that it was necessary for him to borrow the sum of fifteen thousand (\$15,000.00) Dollars for a period of three years, with interest, to fully pay the cost of the construction of the buildings.

On the 21st day of November, 1914, an order was made, authorizing the trustee to borrow the sum of fifteen thousand (\$15,000.00) dollars on mortgage, as the Orphans' Court of Allegheny County may direct. To this order at No. 69 November Term, 1914, Orphans' Court, a petition was filed by Joseph F. Layton, Nancy J. Layton and Edward Joseph Layton, on the 5th day of December, 1914, praying that the same be vacated, on the ground that the legality of the proceedings at No. 167 May Term, 1913, Orphans' Court, has been attacked, and that if that proceeding is unlawful and illegal, which permitted these trust funds to be transferred and invested in Allegheny County, then the mortgaging of real estate, purchased by these trust funds, would also be illegal.

At No. 59 November Term, 1914, Orphans' Court, Bishop Canevin, as trustee, presented a petition to sell, at private sale, certain real estate belonging to the estate of the testator, situate in the Borough of Derry, to John P. Toner for the sum of twenty-five hundred (\$2500.00) Dollars. On the 14th day of November, 1914, an order of Court was made permitting the sale as prayed for in the petition. To this order exceptions were filed on the 30th

day of November, 1914, by Edward Joseph Layton, Nancy J. Layton and Joseph F. Layton, praying that the same be dismissed, on the grounds that the proceeding was invalid and contrary to the Act of Assembly and Rules of Court, in that it failed to set out the names of the persons interested in the estate under the testator's will; that it failed to set out the amount of the personal estate of the testator, together with the just and true account of all the debts of the testator; that it failed to set out a statement of all the real estate of the testator; that it failed to have attached proof of service or acceptance of service of notice by persons interested as heirs, legatees or devisees in the real estate, etc.

At No. 80 November Term, 1914, Orphans' Court there was filed, on the 5th day of December, 1914, by Joseph F. Layton, Miss Nancy J. Layton and Edward Joseph Layton, a petition for a decree to set aside the trust, etc., in which a review of all the legal proceedings from the creation of the trust to the time of filing the petition is set forth, and it is therein averred that the purposes of the trust or charity created by James L. Toner, the testator, have failed, been violated, and made impossible of performance, and then pray as follows:

"First: That your Honorable Court will order or decree that said trust or charity has failed, been violated and made impossible of performance by the acts of the trustee set forth in this petition. Second: That the appointment of the trustee, at No. 128, February Term, 1911, of the Court of Common Pleas of this county is invalid, and is not in accordance with the Acts of Assembly of May 23rd, 1895, P. L. 114. Third: That under the will of James L. Toner, no valid sale of any lands owned by said decedent and situate in Westmoreland County, Pennsylvania, or of any estate or interests in said lands could be made by any one excepting only the executors named in said will, or the survivor of said executors; and that said executors themselves, or the survivor of them, have under the terms of said will, no power or authority to sell said farm or any estate or interest therein. Fourth: That the order of Court made at No. 69 November Term, 1914, authorizing the said trustee to borrow upon mortgage the sum of fifteen thousand (\$15,000.00) dollars in Allegheny County, Pennsylvania, be vacated, as prayed

Term, 1914, No. 69 November Term, 1914, and No. 80 November Term, 1914, by Joseph F. Layton, Nancy J. Layton, Edward Joseph Layton, or by anyone in their behalf, or filed by other persons, in which it is prayed that the orders and decrees at these numbers be set aside and vacated, or for a decree setting aside the trust and the distribution of the trust funds and estate now in the hands of Bishop Canevin by virtue of the will of James L. Toner to his heirs and next of kin, is dismissed at the cost of the petitioners.

SHERIDAN MARSH v. FRANK AND IDA GRONER.

Workmen's Compensation—Casual Employee—Regular Course of Employer's Business.

No matter what undertaking an employer may see fit to engage in, if he has time for premeditation, calculation and design, he must be considered to have engaged in a business; and the employee, under these circumstances, cannot be considered casual, and the defense of casual employee and not engaged in the regular course of the employer's business will be unavailing as against an injured employee.

Hearing de novo. Workmen's Compensation Board, Claim Petition No. 1.

By the Board, August 15, 1916.

Hearing de novo before Harry A. Mackey, Chairman, and James W. Leech, members of the Workmen's Compensation Board at Bangor, Pennsylvania, July 20th and 21st, 1916. Present at the hearing, Sheridan N. Marsh, Claimant; Frank Groner, Defendant; Ida Groner, Defendant; Everett Kent, Esq., counsel for Claimant; H. M. Hagerman, Esq., counsel for Defendants; J. Willard Paff, Esq., for Defendants, together with witnesses both for the Claimant and Defendants.

BRIEF STATEMENT OF MATERIAL TESTIMONY.

The claim petition in the above case was filed January 21, 1916. Said claim petition was referred to Paul W. Houck, Esq., Referee of the Second District. Accordingly the said Referee held a hearing on February 24, 1916, at Bangor, Pennsylvania, and subsequently disallowed compensation holding that "the employment of the Claimant was casual in character and not in the

regular business of the employer" the Claimant having filed an appeal within the time prescribed by the rules of the Workmen's Compensation Board a hearing of the argument on the same was held by Chairman Mackey at Bangor, May 25, 1916. The Board in a written opinion by Chairman Mackey granted a hearing de novo. See Department Reports, Volume II, Page 1108. At the hearing de novo the motion of the defendant was granted to strike the name of Frank Groner from the record as one of the defendants, leaving Ida Groner as the sole defendant in the case. The claimant testified that during the month of December, 1915, upon one of the public streets in the borough of Bangor, Northampton county, Pennsylvania, Frank Groner had asked him if he would help plaster a house belonging to the defendant and thereupon the claimant agreed to become so employed. That in consequence of this employment, he went to work upon the defendant's house which was in the course of reconstruction as a residence in a residential section of the borough of Bangor. The work that he was to do was to help plaster and he was engaged in this occupation up until the fourth day of January, 1916, when he suffered the accident for which he is seeking compensation.

He also testified that while he was thus working the defendant's husband, Frank Groner, was there as a worker and also as a superintendent. Claimant further testified that he (the claimant) worked every day from the date of his employment in December until New Year's day, as that was a holiday no one worked upon the premises, but all the employes reported on the following Monday, but they found that the mortar was in poor shape and inasmuch as the claimant had a little work to do for the Delaware, Lackawanna and Western Railway Company he reported to Groner that he would do it that day and return the next day for the purpose of finishing the plastering, at which time he expected the mortar would be in better shape. This arrangement was adopted by Groner and the claimant's tools were left upon the premises. He finished the work at Johnsonville, Pennsylvania, for the railroad company on that day and in the afternoon returned to Groner and found him at the building in question. According to the claimant's testimony Groner agreed with him that it was too late for

him to resume work that day but that he should return to work the next morning. He testified that he accordingly reported at the building on the following day and met Groner who gave him some directions as to a certain room in the house.

While the claimant was working in that house on that day, January 4th, 1916, and upon a scaffold, it broke and he fell to the floor striking his hand upon a trowel, cutting the tendons of the second, third and little fingers of the right hand. Groner then took the claimant to a physician and subsequently he sent the claimant to the Easton Hospital, where an operation was performed, the charges for which were \$25.00. There was also a hospital charge of \$10.00, a bill by Dr. Reichard for \$2.00 and an expenditure of 75c for medicine.

The claimant also testified that a man by the name of Brensinger, who was also working on the job, came to him as a messenger from Groner stating that "Mr. Groner says, I should ask you to come to work" and that in consequence of that suggestion the claimant did report to Groner for work and this incident was confirmed by Brensinger when he testified.

He swore that he worked on this same house at this particular time with the claimant, that he also had been hired by Groner to work by the day. He further testified that Groner had told him to hire Sheridan Marsh to work upon the house. Groner, he said, kept the time and paid off the hands. The witness had hired others to work upon the premises at the instance of Groner and the witness further testified that Groner gave him the money to pay the claimant.

An admission of both parties appears on Page 75 of the notes of testimony that this dwelling house was 17x43 feet and a two and one-half story dwelling house, two stories for the purpose of living, and the attic, that the two floors are plastered and that the attic is not. The kitchen is a part of the 43 feet.

Mrs. Groner testified that the property cost her \$4,000, clear of encumbrances and probably the alterations would cost about \$2,000. She testified that her husband worked upon the premises and as her agent and he had no authority to do anything without consulting her. She swore that she was superintending the job her-

self. Her husband at that time had no other business. Upon page 79 of the re-cross-examination by Mr. Kent appears:

Q. Mrs. Groner everything that your husband did there he did for you, didn't he?

A. Well I don't know whether he did it for me, he didn't do it for anybody else.

Q. He did it for you, didn't he?

A. He did it for me, yes.

Q. You don't repudiate anything that he has done, do you?

A. Well, I don't know.

Q. You have paid all the bills that he contracted haven't you?

A. I have paid the bills, yes.

Q. And after Sheridan Marsh was injured you gave Brensinger money to pay him didn't you?

A. I did.

Dr. Reichard testified as to the condition of the hand as follows: "One set of tendons has not been united and he cannot flex the phalanges on themselves to close the fingers, he cannot put the thumb and three fingers that were injured, middle, ring and little fingers, in apposition."

Q. Now would you say, Doctor, tell us whether or not this is a permanent injury?

A. Of those three fingers it is permanent. If you will allow me to explain * * * those tendons were cut right down to the bone, clean, the three fingers.

The doctor also testified that the thumb and index fingers are the only part of the right hand of which the claimant has any use. He stated that a further operation would be of no avail to restore the usefulness of this hand.

By agreement the testimony of the witnesses who were called at the original hearing before the referee and whose testimony appears of record in this case except as to Marsh and Brensinger was adopted as though taken at the hearing de novo. In this testimony we find that Frank Groner testified that whatever he did was upon the advice and suggestion of his wife—that he was acting as her agent. It also appears of record that the repairs to this dwelling house were begun sometime in

October, 1915, and were not completed until a considerable length of time after the complainant was hurt. The testimony shows that the claimant was being paid at the rate of 40c per hour for the year 1915. The claimant had worked during that year 1,954 hours at 40c per hour.

THE FINDING OF FACTS.

The Board finds the following facts:

1. Ida Groner, the above named defendant, is the owner of a dwelling house where the work was being done at the time of the accident to the claimant.

2. That Frank Groner was her authorized agent in purchasing supplies for the said house, directing the workmen in their employment, paying them off, hiring and discharging laborers.

3. That the claimant was hired to work upon the said premises to do plastering as a plasterer by Frank Groner as such agent for the owner, Ida Groner.

4. That the said Ida Groner, as principal, ratified and sanctioned the employment of the said claimant, had full knowledge of the same, and evidenced this ratification by paying the claimant what was due him after the accident happened.

5. That Sheridan N. Marsh was injured in the course of the employment by Ida Groner by the breaking of a scaffold upon which he was standing while plastering on January 4, 1916.

6. That the injuries thus sustained are permanent in nature and have rendered the right hand useless to him as a workman. That the operation that was performed on the hand at the Easton Hospital was a major surgical operation. We are led to these conclusions because the operation involved a surgical procedure which entailed immediate serious consequences to the patient and was an operation which required skill and training to perform.

7. That the claimant has been unable to perform any work from the date of the accident up until the date of the hearing de novo, July 20, 1916.

8. That Ida Groner entered into the business of reconstructing the said dwelling and thereby became engaged as contemplated by the Pennsylvania Workmen's Compensation Act of 1915. That the claimant was

engaged in a continuous employment. That a day's work was eight hours.

Daily wage, therefore, is \$3.20 and his weekly wage under Section 309 was \$17.60.

CONCLUSIONS OF LAW.

Our conclusions of law are that Ida Groner as the owner of this property had entered into the business of its alteration and improvement. We reaffirm and reiterate the opinion of the Board filed in this case when we granted the hearing *de novo*. We were led to grant a hearing *de novo*, because of the allegation of the defendant that on account of the intimation of the referee that he believed that the claimant's case was not well founded under our law, that he, the defendant, had not offered any evidence bearing upon the question of the employment of the claimant.

The defendant set up as a defense that she was not the employer of the claimant, but that he was an employe of Ferdinand Brensinger, who was an independent contractor and therefore, that she was relieved of responsibility. The law of the case was perfectly apparent to the Board and were it not for this allegation on the part of the defendant, it could have revised the findings of the referee upon the record then returned without a hearing *de novo*. At the said hearing there was no testimony produced to substantiate the allegation that the defendant was not the real employer of the claimant.

In this case we must look at the whole transaction and not upon any particular incident connected therewith when determining the character of the business of the defendant or the employment of the claimant.

The defendant began this operation before the Workmen's Compensation Act of 1915 was in force and therefore her situation came within Section 302-a, for she had a contract of hiring made before December 31, 1915, and the law conclusively presumes that the parties continued their relationship and adopted compensation because neither in writing previous to January 1, 1916, notified the other that he or she did not intend that the provisions of Article III of the act should apply to the said contract.

In order that there may be no doubt as to the posi-

tion of the board on the law of this case, we will reiterate our former conclusions of law and the reasons adopted in the opinion of Chairman Mackey upon granting the hearing de novo.

The policy of the law is against the creation of any situation whereby a workman can be engaged in his occupation within the State of Pennsylvania and be deprived thereby of the benefits of the Workmen's Compensation Act. The legislature exempted four classes of employes, namely: The agricultural worker, the home worker, the casual employe not engaged in the regular course of the master's business, and the domestic servant. Whenever an employer claims the benefit of these exemptions the burden of proving that the claimant falls within one of these enumerated classes is surely upon him. We take it that it is our duty to allow no injured employe to go without compensation unless the defendant has squarely met this burden of proof and established the exemption both in fact and in law beyond the peradventure of a doubt. In this particular case there can be no question but that the owner of the property, Ida Groner, a woman of financial responsibility, had purchased a property and was reconstructing the dwelling for the purpose of creating a home. Her husband, also a property owner in his own right, had at or about that time retired from active business and was acting as his wife's agent, in the hiring of men and superintending the reconstruction of this dwelling.

In order that an employer may be deemed to be in "business," we will not hold that the extent of time necessary to complete the undertaking is an absolutely determining factor. Business can be said to be that which busies, or engages time, attention or labor, as a principal serious concern or interest, or as further defined in Webster's Dictionary as "a particular subject of labor or attention; a temporary or special occupation or concern."

For four months Mrs. Groner had been engaged in the business of repairing her house, and her husband, as her agent, had been securing employes on the faith of his principal's ability to pay. In the meantime this law became effective on the first day of January, 1916, at a

time when the dwelling was still in the course of reconstruction.

The act follows the British Act of 1906, which relieves the employer of the obligation to compensate the injured employe if the employment was casual and not in the regular course of the employer's business. See Section 104, Article I, Workmen's Compensation Act of Pennsylvania, 1915.

Therefore we can profitably consult the decisions of the English Courts as well as those of our sister states when in the statutes the conjunction "and" is used rather than the disjunctive "or." It is immaterial, then, in the consideration of this or any other whether the employe's work was "casual" if once determined he was engaged in the "regular course of the business of the employer."

It is worthy of notice that the order of the words of the law is "the regular course of the business of the employer" and not "the course of the regular business of the employer." In considering this question, then, we only have to determine whether or not the employe was engaged in the "business" of the employer.

It cannot be said when one is engaged for four months in repairing, building or reconstructing a dwelling that he is for the purposes of this act not in any business. The reconstruction of this house had certainly engaged the time, attention, labor, concern and interest of the owner.

For the purpose of this case, as has been previously observed, there need be no discussion of the question of what is a "casual employe" under the act, nevertheless we will embrace this opportunity to place a few of our thoughts in this regard on record:

At the outset it may be observed that our board encounters the same difficulty that has been recognized by the English Courts, viz: That there can be no unbending rule as to what does or does not constitute "casual employment." English Courts have frequently declared their inability to determine in any one case what is a "casual employe," generally speaking, or to adopt any definition that will be comprehensive of all conditions that may arise. The courts have frequently stated that each case must depend in a very large degree upon its

own facts. This statement is clearly established by a study of such cases as *Hill v. Bogg*, 2 K. B., 802; 1 B. W. C. C. 320, *Johnson v. Monasterevan v. General Stone Co.* 2 B. W. C. C. 183, and *Blythe v. Sewell* 2 B. W. C. C. 476. Thomas Bevan, in his book on "Law of Employer's Liability and Workmen's Compensation" (1909) adopts the definition of the word "casual" as "depending on chance; depending on or produced by chance; occurring or coming at uncertain times not to be calculated on; coming without design or premeditation; casual labourer; one who does casual or occasional jobs"

The Connecticut Act, like ours, follows the British as to the use of the word "and" as distinguished from the word "or," thereby only exempting the casual employe if he be not engaged in the regular course of the employer's business. Any decision of the Connecticut Commission is persuasive in discussing the Pennsylvania Act.

We find a very illuminating opinion filed by Hon. George B. Chandler, Compensation Commissioner of the First Congressional District of Connecticut, under date of March 1, 1916, in the case of Henry J. Gorse, employe, against Stephen Chaplin, employer (not yet reported). In passing upon the question as to whether Gorse was a casual employe, the Commissioner says:

"In order that a workman be excluded from the terms of the act such workman must be either an out-worker or both a casual employe and a person employed for purposes other than the employer's trade or business or a member of the employer's family dwelling in his house. In my opinion Gorse was neither a casual employe nor was he employed for purposes other than those of his employer's trade or business. He was not picked up, on the spur of the moment, and put to work on an odd job. He took his place alongside other workmen engaged in the operation in question, which was of sufficient magnitude to call for an expenditure of approximately \$546, and required for its performance some two months' time. His employment was brief merely because of an injury soon after his employment began. Presumably his employment might have continued until the job was completed had this injury not occurred. The record does not reveal that Chaplin had any trade or business other than

operating this summer place. He had bought an old farm in Hartland, Connecticut; he lived on it or operated it in the summer. He was engaged in the process of improving it, apparently for his own pleasure or convenience.

"I am of the opinion that in so far as his relation to the State of Connecticut and its Compensation Act is concerned, he is to be considered as having entered into and being in the business of operating and improving this farm or estate. If we are going to permit persons residing outside of the state and engaged in some unknown business or no business to enter the state and employ five or more persons in some enterprise here and then enter upon the technical plea that such persons are not their employees upon the ground that it is not their 'business' to use such employees, we are creating a loophole in the act open to grave abuse.

I am not ready to adopt the construction that all an employer has to do to escape the terms of the Workmen's Compensation Act is to show that he had no trade or business. In an industrial state like Connecticut such an interpretation might fairly be said to be contrary to public policy."

The language of Commissioner Chandler suggests the same thought which we undertook to voice at the beginning of this opinion, viz; that it is against the policy of our law to create any situation whereby there can be an unwarranted escape from liability by any technical plea on the part of the employer. All our acts, Nos. 338 to 343, inclusive, constitute our system of compensation and insurance. They are to be interpreted in the light of and in relation to each other. We will be doing no violence to the evident intention of the legislature by suggesting that when an employer is about to engage in an undertaking which will require a certain number of employees, whose employment will be definite in character, requiring a period of time for completion capable of approximate calculation, then the law imposes upon him the duty of contemplating the question of insurance and the employment can not be then deemed "casual."

Our law had favored him with the opportunity of securing personal immunity by taking advantage of any

one of the insurance schemes that may appeal to him. The same law that has given him the opportunity will impose a liability upon him for not taking advantage of the same. When, therefore, an employer has the opportunity, in advance, of making definite plans for a given undertaking, and he can ascertain with some degree of certainty the cost of same, and can, if he chooses, secure compensation insurance, he cannot be said to be engaged in "casual employment," nor can he subsequently escape liability to an injured employe on the ground that the employment was "casual and not in the regular course of his employer's business."

It is not our intention to interpret the term "casual employment," so that by any circumlocution or vague technicality the employer can escape a just liability; nor do we intend to violate a common sense interpretation of the term nor to defeat the apparent intention of this act. In conclusion, then, no matter what undertaking an employer sees fit to engage, if he has time for premeditation, calculation and design, he must be considered to have engaged in a "business" and the employe under these circumstances can not be considered "casual," and under our act the defense of "casual employe," and not engaged "in the regular course of the employer's business," will be unavailing as against the injured employe.

AWARD.

It is hereby ordered that the defendant pay to the claimant the following sums to reimburse him for payments made on account of medical attention:

Operation	\$25.00
Easton Hospital, board and room.....	10.00
Dr. Reichard	2.00
Medicines	.75

It is further ordered that the defendant pay to the claimant 50 per cent. of his weekly wage of \$17.60 or \$8.80 per week from January 18, 1916, a period of time not to exceed 175 weeks and if at any time the claimant acquires an earning capacity then upon petition and proof, the award will be modified in accordance with such facts as may then develop.

It is further ordered that the defendant pay the costs of these proceedings. Witness bill before the Compensation Board:

Name.	Days.	Miles.	Amount.
Steward Marsh	1	2	\$1.56
Ferdinand Brensinger	1	2	1.56
John Brensinger	1	2	1.56
Alfred Albert	1	2	1.56

Total\$6.24

Also the following witness bill filed by the claimant at the referee's hearing which was made a part of the record by order of the board under date of July 26, 1916:

Name.	Days.	Miles.	Amount.
Steward Marsh	2	2	\$3.06
Ferdinand Brensinger	2	2	3.06
John Brensinger	2	2	3.06
Alfred Albert	2	2	3.06
N. W. Reichard	2	2	3.06
Edward Vostellar	2	2	3.06
John Stiles	2	2	3.06
Horace Stiles	1	2	1.56
Matthew Italo	1	2	1.56
Everett Kent, Esq, advanced for subpoenaing witnesses		35	7.00

Total\$31.54

POSTPONED CALENDAR. APPEALS PENDING BEFORE THE BOARD INVOLVING THE QUES- TION OF INTERSTATE COMMERCE.

Workmen's Compensation—Interstate Commerce—Conflict of State and Federal Jurisdiction

Appeals pending before the Workmen's Compensation Board which involve questions of interstate commerce have been placed upon a postponed calendar to await the determination of the conflict of jurisdiction between state and federal tribunals by the Supreme Court of the United States. Hereafter all appeals involving such questions will be placed on the postponed calendar.

The views of the Workmen's Compensation Board upon the merits of state and federal control of employers' liability are given in the following opinion:

William and Mary Flanagan v. Lehigh Valley Rail-
road Company.

Henry Smith v. Phila. and Reading Ry. Co.

James Keiper v. Lehigh Valley R. R. Co.
Mamie J. Kraft v. Phila. and Reading Ry. Co.
Katie Beaumont v. Phila. and Reading Ry. Co.
Yosef Garowsewski v. Phila. and Reading Ry. Co.
Mary Koch v. Phila. and Reading Ry. Co.
Elizabeth Carey v. Phila. and Reading Ry. Co.
Helen Kehres v. Phila. and Reading Ry. Co.
Roy F. Brill v. Lehigh Valley Coal Co.
Thama A. Mest v. Phila. and Reading Ry. Co.
George Birli v. Phila. and Reading Ry. Co.
Fedor Naboka v. Phila. and Reading Ry. Co.
Elvie P. Leonard v. Phila. and Reading Ry. Co.
Mayme A. E. Wenner v. Phila. and Reading Ry. Co.
Julia M. Conrad v. Phila. and Reading Ry. Co.
Thomas Wilson Young v. Phila. and Reading Ry. Co.
Mrs. Lillie Somers v. Phila. and Reading Ry. Co.
Guy Robinson v. Lehigh Valley R. R. Co.
Frank J. Raub v. Lehigh Valley R. R. Co.
Mary Gabrich v. Phila. and Reading Ry. Co.
Bertha L. Shuey v. Phila. and Reading Ry. Co.
Mary A. Cameron v. Phila. and Reading Ry. Co.
Irvin B. Bomgardner v. Phila. and Reading Ry. Co.
Harry A. Werner v. Phila. and Reading Ry. Co.
Anna Comeskie v. Central R. R. of N. J.

Mackey, Chairman, August 26, 1916.

It is hereby ordered that the above cases be placed upon a list to be designated as "Postponed Calendar" and that, hereafter, all appeals which involve the question of interstate commerce shall be placed thereon until the Supreme Court of the United States shall have passed upon the conflict of jurisdiction between federal and state tribunals. This confusion arises from the fact that congress by the Act of 1908 legislated as to the method of litigation when both the employer and the injured employe were engaged in interstate commerce. This Act of Congress applies solely, however, to employes of railroads. The Pawnee, 205 Fed. 333.

This legislation was prior to the enactment of any State Compensation Law. Since that time we have had thirty-one legislatures provide a method of compensating injured workmen. Necessarily the administration of

the state and federal law has developed interesting questions of jurisdiction. This has given rise to two definite and well considered theories, the one being diametrically opposed to the other and each in turn being upheld by the highest courts of the states adopting the one or the other.

A case typical of the one view and which is now pending in the Supreme Court of the United States is *Winfield v. N. Y. C. & H. R. R. Co.*, 153, N. Y. Supp. 499 (1915) where the court of last resort of the State of New York sustained the theory that a track laborer, who was injured while engaged in tamping ties on a track used for carrying both interstate and intrastate commerce, could maintain a claim for injury under a State Workmen's Compensation Law. The Court said "The Federal Employer's Liability Act is entitled 'An act relating to the liability of common carriers by railroads to their employes in certain cases.' The title clearly indicates that it does not cover all the grounds of liability but that the act relates only to the particular cases expressly provided for in it. The provisions of the act relate solely to liability on account of negligence. The several states, therefore, in the exercise of their police power, may make such laws and regulations for the protection of the laborers within the State as may seem best, unhampered by the Federal Employers' Liability Act, except so far as they attempt to prescribe a liability for negligence or the remedies therefor in interstate commerce. The Workmen's Compensation Law has no reference to the question of the negligence of the employer and created no liability or remedy for negligence. * * * Congress has not established any general rule of liability or method of compensation between employers and employes."

The New York doctrine then is that inasmuch as the Federal Liability Act cannot be invoked by an injured railroad employe unless his employer has been guilty of negligence, therefore Congress has not invaded the field of injuries where a workman, although he may be engaged in interstate commerce, has been injured in the course of his employment without any negligence at all on the part of his employer, and to that extent then the legislature of the State can step in and provide a remedy

through a State workmen's compensation law and by so doing does not trespass upon a field of legislation already occupied by Congress and that in such event there is, really, no conflict in jurisdiction at all.

The contra-view is fairly represented in the case of *Smith v. The Industrial Accident Commission of California*, 147 Pac. 600 (1915), where the court of last resort of the State of California denied compensation to a special agent who, while removing trespassers from an interstate train on an interstate railroad, jumped from the train and started in pursuit to drive the trespassers from the company's property and while so doing was injured by his revolver falling and one of the cartridges therein exploding. The Industrial Commission held that he was engaged in interstate commerce at the time and denying its own jurisdiction, refused compensation.

The California Court declined to adopt the negligence distinction of the *Winfield* case and said:

"The Congress of the United States in April, 1908, passed what is known as the Employer's Liability Act which fixes the responsibility of every common carrier towards its employees while engaged in commerce between the several states where any such employees are injured through the negligence of the officers, agents or other employees of the carrier. In the year 1913 the Legislature of California passed a measure known as the Workmen's Compensation Insurance and Safety Act which provided for compensation to be awarded to employees injured while engaged in the work of their employers regardless of whether the accident occurred through the negligence of the employer or his agents, servants or other employees. It will be seen then that as applied to common carriers, the State act covers precisely the same field as does the national legislation with the qualification that the State act obliges the employer to compensate employees for accidental injuries sustained without negligence on the part of his agents or employees, as well as those arising through the negligence of such persons. The United States Congress is given power by the Constitution to regulate commerce among the several states. As to the application of local or State statutes made in the exercise of the police power affecting instrumentalities of interstate commerce, it is said that this

subject belongs to the reserved power of the states; that is, the power may be exercised by the states in the absence of legislation covering the same subject by Congress. When the power of Congress, however, is exerted in the direction of covering the matter sought to be so regulated and is comprehensive to that end, then the State regulation must give way before the superior law. * * * ,”

The California idea has been likewise adopted by the Supreme Court of Illinois in *Staley v. Ill. R. R. Co.*, 268 Ill. 356 (1915). These cases are now in the Supreme Court of the United States and it would only be a vain assumption of authority then upon our part to undertake to apply any rule of law to the twenty-six cases that have accumulated upon our list and are now placed upon the “Postponed Calendar” because of these conflicting theories.

No matter what view the Supreme Court may adopt, the situation of the railroad employe will be unfortunate. If the Winfield theory prevails, great contention and long delay will accompany the determination in each case as to whether or not the employe was injured by the employer’s negligence. If the Smith thought is adopted then injured railroad employes are without any form of redress or compensation in the majority of the accidents that shall befall them.

This large list of our own demonstrates the fact that this uncertainty of jurisdiction has caused a delay that is incompatible with the theory of compensation and leads us to certain observations:

There is no question that when Congress, within its constitutional rights, enters a particular field of legislation, it acquires exclusive jurisdiction. *Seaboard Air Line v. Horton*, 233 U. S. 492; *Second Employer’s Liability Cases*, 223 U. S. 1.

It is equally certain that although Congress may have the power of legislating upon a certain subject, until it exercises that power, the regulation of that subject can be left to the legislatures of the states.

Simpson v. Shepard, 230 U. S. 352.

It is interesting in this connection to note the language of Mr. Justice Hughes who wrote the opinion. *Inter alia* he said:

"But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * * Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by the State legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; * * * * Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. * * * * Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for non-feasance or misfeasance within its limits. * * * * Until the enactment by Congress of the Act of April 22, 1908, the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon."

It has been further conclusively established that Congress has no constitutional power to legislate upon purely intra-state matters, *First Employers' Liability Cases*, 207 U. S. 463.

As far as is consistent with substantial justice the matters that pertain to the welfare of the citizen of a state ought to be regulated and controlled by the state herself. State sovereignty should be preserved as far as possible. The only authority of Congress to legislate upon the subject under discussion is contained in Article I, Section 8, Paragraphs 3 and 18 of the Constitution of the United States. Where there is conferred upon Con-

gress the power "to regulate commerce * * * among the several states" and "to make all laws which may be necessary and proper."

The Supreme Court of the United States in *Mondou v. N. Y., N. H. & H. R. R.*, 223 U. S. 1., said:

"It does not admit of doubt that while Congress in the exercise of its power over interstate commerce may regulate the relations of common carriers by railroad and other employes, while both are engaged in such commerce subject always to the limitations prescribed in the Constitution and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employers are engaged."

But why should Congress enter this field? It has enacted very little of the great bulk of the railroad legislation of this country. It cannot provide forms of litigation or remedies between injured employes and employers in other activities. Taxation and regulation in other respects have been left to the various states and we believe that Congress would do well if it not only repealed the Federal Liability Act of 1908 but would also decline to adopt any other laws which might obtrude themselves in the way of state regulation of compensation to injured railroad employes. The tragedy of the home where the wage earner has been stricken in an industrial accident and remained uncompensated, is a state calamity, while the relief of the pauperism that often follows in the wake of such injury is a state problem. The education of the children and the care of the unfortunate families where the father and the wage earner has been stricken in industrial injury was always a state responsibility and a most perplexing problem until the legislatures of many states accepted the verdict of society in the form of compensation laws. A man is no less a citizen of his own State because he is engaged in railroading. The responsibility of the State towards him is not lessened because of the fact that he is employed by a carrier of interstate commodities. Therefore, why will not Congress allow the State to solve the railroad man's troubles as she does those of her citizens engaged in other industrial pursuits?

Congress did well when it first undertook to provide legislation which would relieve the injured railroad employe of some of the rigors and hardships incident to a trial in court where contributory negligence, risk of employment and negligence of fellow employe figured so largely against the injured man. The Act of 1906, although declared unconstitutional, First Employers' Liability Cases (*supra*) was the first evidence that our national law makers were beginning to realize that public sentiment was demanding some modification of the common law rules of procedure in this class of cases.

The Act of 1908, as subsequently amended in 1910, has been declared constitutional, *Mondon v. N. Y. N. H. & H. R. R. Co.* (*supra*). While it relaxed to a certain extent the hardships of the old common law procedure and rules of evidence, nevertheless it has retained many of the undesirable features of litigation and stands in the way of a proper administration of the compensation laws of many states.

There are many questions that arise in the administration of the Federal Employers' Act of 1908.

It must first be determined whether both the injured man and the railroad company were engaged in interstate commerce at the time of the accident. This has led to over five hundred decisions announcing what is meant by interstate commerce and when an employe and the defendant can be said to be thus engaged.

In *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146, the Supreme Court said:

"That the defendant was engaged in interstate commerce is conceded and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in de-

manding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. We are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: is the work in question a part of the interstate commerce in which the carrier is engaged?"

In *Shanks v. D., L. & W. R. R. Co.*, 239 U. S. 556—
The Court said:

"The defendant company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter shaft (a heavy shop fixture) through which power was communicated to some of the machinery used in the repair work. The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (See *Swift and Company v. United States*, 196 U. S. 375, 398) and that the true test of employment in such commerce in the sense intended, is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The principle of these cases has been consistently followed in numerous decisions. Perhaps it has been as well defined in *Montgomery v. S. P. Co.*, 131 Pac. 507. Here the plaintiff was a brakeman of a switching crew engaged in moving a car containing oil for interstate locomotives. The Court said:

"In the business of an interstate railroad, the interstate and intrastate traffic is intermingled and usually handled indiscriminately. It would be practically impossible to name any servant of an interstate road who is employed exclusively in the furtherance of purely interstate traffic. All employees who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce within the meaning of the act. The fact that a portion of plaintiff's work pertained to local traffic would not change the character of his labor in the performance of acts reasonably, proximate and essential to the moving of interstate freight and in assistance thereof."

In *Deal v. Coal and Coke Ry. Co.*, 215 Fed. 285, an employe who was injured while engaged in repairing a telegraph line which was used for the purpose of directing operations of both interstate and intrastate trains, was held to be engaged in interstate commerce.

In *Sounders v. So. Ry.*, 83 S. E. 573 (N. C.), the decedent was killed while engaged in erecting an electric block signal system along a track over which both kinds of traffic passed, and was held then to be in interstate commerce.

In *C. N. O. & T. P. Ry. Co. v. Bonham*, 171 S. W. 79 (Tenn.), a signalman, whose duties were connected with electric signals controlling operations of both interstate and intrastate trains, was held to come within the provisions of the Federal act where he was run down while discharging his duties.

In *Grow v. Ore. S. L. R. R. Co.*, 138 Pac. 398 (Utah), the decedent was engaged in installing a block system which was designed to protect both interstate and intrastate trains. Held that he was engaged in interstate commerce. The Court said:

"For the better conduct of such commerce (inter-

state) and the moving of such traffic, and to promote the safety of employes in operating interstate trains, and of passengers transported from state to state, it was necessary, or, at least, desirable to equip its line of railway with block signals. * * * They, not remotely, not incidentally, but directly related to such commerce, for they afforded protection against obstructions on, or breaks in the track, were attached to, and operated in connection with it—and thus tended to promote the safety, not only of the employes engaged in the operation of interstate trains, but of passengers transported from state to state.”

In *Nor. Pac. Ry. Co. v. Moerkl*, 198 Fed. I, it was held that an employe engaged in repairing a car used indiscriminately in interstate and intrastate commerce was engaged in interstate commerce.

In *Eng. v. So. Pac. Co.*, 210 Fed. 92, it was held that an employe engaged in repairing a freight shed in which both interstate and intrastate shipments were placed, was engaged in interstate commerce.

Yard clerks examining incoming and outgoing trains and making a record of the seals on car doors, checking cars with conductors' lists, putting cards or labels on the cars to guide switching crews in making up incoming and making up outgoing trains engaged in interstate commerce are within the Federal act if there are any interstate shipments in the train. *St. Louis, San Francisco & Tex. Ry. Co. v. Seale*, 229 U. S. 156.

Members of switching crews at railroad terminals while engaged in moving cars containing interstate shipments are employed in interstate commerce within the meaning of the Federal act.

On the other hand if the cars which are being moved at the time of the casualty do not contain any interstate shipments and contain only shipments between two points in the same state, if injured under such conditions, a member of a switching crew is not engaged in interstate commerce, and liability is to be determined exclusively by the law of the state, although a few minutes before the accident he had been engaged in interstate commerce and expected to again within a few minutes thereafter take up the work of moving cars containing

interstate shipments. *Ill. Cent. Ry. Co. v. Behrens*, 233 U. S. 473.

A brakeman on a "pick-up" freight train running between points in the same state but containing some cars loaded with interstate freight who was injured while attempting, in the course of his employment, to set the brake on an interstate car which had been cut out of the train and backed into a siding, was employed in interstate commerce. *N. Y. C. & H. R. R. Co. v. Carr*, 238 U. S. 261.

A railroad employe injured while acting as a switchman was employed in interstate commerce where he was engaged at the time in distributing cars from an interstate train, and clearing the tracks for another interstate train. *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352.

An employe of an interstate carrier injured in a collision while taking a road engine from a point in one state to a repair shop in another state, was employed at the time in interstate commerce, although the train order under which he was then proceeding directed that his engine be run "extra" between two named points, both of which are in the same state. *Chicago, Rock Is. & Pac. Ry. Co. v. Wright*, 239 U. S. 548.

Therefore, it can be readily seen that with the tendency of the courts to construe almost every form of activity on the part of a railroad employe as being in the nature of interstate commerce, there will be rarely a case where a railroad company cannot avoid a state compensation law by pleading "Interstate Commerce."

When it is remembered that no injured railroad employe can recover under the Federal Act of 1908 unless there is evidence of negligence on the part of the defendant, and when it is further borne in mind that only a small percentage of such accidents present any evidence of negligence at all, it becomes perfectly evident that the railroad employes of the United States are, in the main, deprived of the benefits of workmen's compensation laws which are extending their manifold mercies to the wage earners of so many states.

Congress is trying to meet this difficulty by passing a Federal compensation law for employes engaged in interstate commerce. The measure is known as the

"Southerland Bill"—Senate Bill No. 4673. Its title reads as follows:

"To provide an exclusive remedy and compensation for accidental injuries, resulting in disability or death to employes, aids or common carriers by railroads engaged in interstate or foreign commerce or in the District of Columbia and for other purposes."

It is not entirely clear what can be accomplished by the passage of this act. The object of a compensation law is to eliminate litigation by substituting certain and speedy relief for long delayed uncertainty. It is improbable that this act would bring about this condition, for with two tribunals in every jurisdiction to pass upon compensation for injured workmen, the first question that must necessarily arise would be as to which forum should a given case be started. Again the problem would be, was the employe engaged in interstate commerce? Who would decide this in the first instance? Would the employe be compelled to choose his forum and take the chances of being in the wrong court and while his status was being determined would the Statute of Limitations run against his right of action in the proper tribunal? Thus the injured man is faced at once with litigation over a question that to him is very unimportant. All he knows is that he was hurt while giving his employer his very best service and what he needs is relief and not a discussion of a legal proposition. The proposed Act of Congress cannot avoid this litigation over a question which is immaterial to the main purposes of a compensation law. There ought not to be in the same territorial jurisdiction two tribunals addressing themselves to the solution of the same problems. The railroad employe would not be able to understand why his case should be tried in a different forum from that of his injured neighbor who happened to be a carpenter or a brick-layer. Nor could he understand nor appreciate why there should be a different rule of compensation between them.

This act would provide very little relief to approximately two million men engaged in railroading and its allied pursuits, who would be deemed to be under interstate commerce according to the foregoing decisions, for the reason that it places a premium upon jury trials. The

delays then incident to the administration of this act would be quite as great as those that existed in our common law courts before the adoption of compensation laws.

This act likewise would place upon the government huge expenses of administration.

All these difficulties would be solved by Congress repealing the Federal Employers' Liability Act of 1908. Ample justice and a real remedy can then be accorded to the railroad employes of the thirty-one states that have already adopted compensation. Public sentiment, now standing behind this scheme of justice to industrial workers will compel the legislatures of the remaining states to adopt like laws for the protection of their workmen. It has been suggested that Congress might pass such a law as the Southerland Bill and make it applicable only to states that have no compensation law. This would be the consummation of an ideal proposition if it is within the power of Congress so to do. Many very convincing arguments have been made showing that Congress could do this. Chairman Pillsbury, of the Industrial Accident Commission of California, has written a paper upon the subject and found a very close analogy between such a situation and the Webb-Kenyon Act recently declared constitutional by the Courts of Iowa, North Carolina, Mississippi and Kansas. This law provides that the transportation of intoxicating liquors into any state to be used in violation of the laws of such state shall be unlawful. That is to say, interstate commerce in intoxicating liquors is prohibited as to a certain class of states, but not prohibited as to all other states.

The happiness, contentment and welfare of the vast army of railroad workers of the United States will be more promptly and thoroughly secured by allowing them to submit their claims for compensation to state tribunals than by any scheme that can be devised by Congress. In our state the industrial workers thoroughly appreciate the Pennsylvania Workmen's Compensation Law of 1915. A feeling of contentment and certainty has taken possession of the man who toils, for he knows that no matter what misfortune may overtake him in his daily labor the legislature of his state has made provisions for his dependents that will secure them against real want and will

care for and nourish them during a period when relief is most needed.

On the other hand the citizen who is engaged in railroading goes to his hazardous employment each day knowing that if he should be killed in his occupation, that he has left to his wife and dependent children an inheritance of litigation. They must meet the railroad company in court and establish its negligence before a jury can consider the question of damages. All the disadvantages are upon those least able to meet this burden of proof. They will also be subjected to all the delays, uncertainty and expense which a compensation law avoids. There can be little wonder that discontent pervades the army of railroad employes throughout the United States. Congress cannot solve this question because litigation over immaterial matters and jury trials cannot be eliminated by our national law makers.

The foregoing list of cases that appear upon our "Postponed Calendar" when the defendant in each case has suggested its immunity to our State Compensation Law, does not include the Pennsylvania Railroad. This company from the first has assured the Board of its desire to fully comply with the provisions of our act. Notwithstanding the complications that arise out of the question of interstate commerce, the difficulty of procedure has been quite successfully solved by this company which is applying the schedule of the Pennsylvania act to every case to the end that the principles of our law are being substantially complied with in every particular. This company's method of settlement is as follows:

1. As to cases which are clearly intrastate:

The Pennsylvania act is followed by effecting an agreement with the claimant for the periodical payments provided in the act for that particular case.

2. As to cases which are clearly interstate, or where there is any doubt as to the character of the commerce in which the employe was employed at the time of the accident:

(a) Where a claim petition has been filed, an agreement for a lump sum payment is made, based on the schedule of the act, commuted by the Board under Sections 316 and 424, which is paid over to the injured employe, or, in case of death, to his personal representa-

tive, who signs a general release therefor. By this means protection both under the Federal and the State law is secured.

(b) Where no claim petition had been filed this company endeavors to effect settlement on the basis of the schedule provided in the act, commuted to a lump sum payment, taking a general release therefor, and notifying the Compensation Bureau of such settlement so that a proper record of the same can be kept by its department.

Thus a great corporation engaged in interstate commerce has recognized the utility of our compensation scheme, and in a spirit of modern humanity has declined to enter technical defenses but has adopted a broad gauged plan of applying our law and at the same time protecting itself against another doubtful, uncertain and unsatisfactory liability created by Congress. Our Board has received assurances from other great carriers that they will adopt the Pennsylvania plan. Our reference therefore is in recognition of the broad and high minded policy of the latter and not a criticism of others.

WOLFE v. M'DEVITT.

Insolvency—Bond—Surrender of Principal.

Where a defendant in an action of *capias ad respondendum* in *assumpsit* for breach of promise was taken into custody by the sheriff after judgment against him for want of a plea and an appearance, and was subsequently released on his petition as an insolvent debtor after having given bond with two sureties conditioned that he shall appear at the next term of the Court of Common Pleas of said County and then and there present his petition for the benefit of the insolvent laws of this Commonwealth and comply with all the requirements of the said law and abide all the orders of the said Court in that behalf or in default thereof and if he fail in obtaining his discharge as an insolvent debtor he shall surrender himself to the jail; judgment was entered on the bond against the sureties when it appeared that the defendant, although he had presented himself at the next Court of Common Pleas, took no steps toward procuring his discharge as an insolvent, and although subsequent to the forfeiture of the said bond the defendant had been surrendered to the jail warden by his bondsmen and committed to prison.

Where the condition of the bond is that defendant appear at the next term of Court and then and there present his petition for the benefit of the insolvent laws, etc., by reason of his failure to present his petition the condition of the bond is broken and there is no dis-

cretionary power in the court to relieve him from the plain provisions of his contract. The bond is not an engagement with the court, but an obligation prescribed by statute for the benefit and as a security for creditors, and the sureties on the bond are not relieved from liability by the fact that the insolvent surrendered himself for imprisonment after the forfeiture of the bond.

Action to recover on bond given by defendant in insolvency. Common Pleas of Northumberland County. No. 45 February Term, 1915. Mamie M. Wolfe v. Columbus B. McDevitt, Thomas J. McDevitt and John O'Gara.

C. M. Clement and Harry A. Coryell for the plaintiff.
J. A. Welsh and C. R. Savidge for the defendants.

Moser, J., May 22, 1916.—The record in this case, as well as the record and opinion filed to No. 87 February Term, 1911, reported in 1 Northumberland Legal Journal 178, shows that on the 23rd day of December, 1910, Mamie M. Wolfe instituted an action of *capias ad respondendum* in *assumpsit* for breach of promise against Columbus B. McDevitt. That on the 16th day of April, 1912, judgment was entered against the defendant for want of a plea and appearance. A jury ordered and assessed damages at \$3,000 on the following day. On the 13th day of the next month judgment was taken on the verdict, a *capias ad satisfaciendum* was issued and the defendant taken into the custody of the sheriff. The said Columbus B. McDevitt was committed to jail where he was detained until the 17th day of May, 1912, when he presented a petition to the court praying, "that he may be permitted, in order to procure his discharge under the insolvent laws, to give bond to the plaintiff, Mamie M. Wolfe, in such amount, and with such security as the court may approve, agreeably to the Act of Assembly authorizing the judges of the several courts of Common Pleas of this Commonwealth, and further supplements thereto, to take security and discharge insolvent debtors from arrest," when the said defendant was released upon giving bond, in the sum of \$1,000 with Thomas J. McDevitt and John O'Gara as sureties. In the said bond it was stipulated "that if the said Columbus B. McDevitt shall appear at the next term of the court of Common Pleas of said county shall direct, and then and there

present his petition for the benefit of the insolvent laws of this Commonwealth, and comply with all the requirements of said law, and abide all the orders of the said court in that behalf, or in default thereof, and if he fail in obtaining his discharge as an insolvent debtor, if he shall surrender himself to the jail of the said county, then this obligation to be void, otherwise to be and remain in full force and virtue."

On October 7, 1912, the first day of the next succeeding term of Common Pleas Court, the defendant appeared in court with his counsel. No steps were taken by him toward obtaining the benefit of the insolvent laws but exceptions to the defendant's discharge were filed by counsel for the plaintiffs. The court ordered said exceptions for argument on October 21, 1912, upon which date Judge Cummings, at the instance of plaintiff's counsel, made the following order, to wit, "Columbus McDevitt not appearing as required by the order of court, the bond filed is hereby declared forfeited, the said Columbus McDevitt having been called three times and not appearing." The said Columbus McDevitt was surrendered to the jail warden by his bondsmen and committed to prison on the 4th day of November, 1912; the same day he filed a voluntary petition in bankruptcy in the United States District Court for the Middle District of Pennsylvania and was adjudicated a bankrupt on the 6th day of the same month. The defendant was released from prison on the 18th day of November, 1912. It has not been shown that the bankruptcy proceedings were ever concluded and the said bankruptcy discharged; nor does it appear anywhere in this case that, to the present day, the defendant took any further steps toward procuring his discharge as an insolvent. This action was brought on the 11th day of December, 1914, to recover on the said bond against the herein-named defendants and by agreement between the said parties trial by jury was dispensed with, the proceedings being submitted to the decision of the court.

In the affidavit of defense filed by John O'Gara and Thomas J. McDevitt it is averred that on the 7th day of October, 1912, the said Columbus B. McDevitt presented a petition for his discharge as an insolvent debtor; that on the same day the plaintiff presented exceptions to the

discharge of the defendant, and the said Court of Common Pleas, without notice to deponents, continued the hearing on the said petition until the 21st day of October, 1912. That on the 20th day of October, 1912, an uncle of the defendant, who made his home with defendant, died very suddenly and, on account of making arrangements for the funeral of said uncle, the defendant was unable to appear. That deponents did not learn that said defendant was required to appear on the 21st day of October until the 3rd day of the next month when they promptly secured a bail-piece and delivered the defendant to the warden of the jail.

There is nothing in this record or testimony which tends to sustain the defendants' averment that on the 7th day of October, 1912, Columbus B. McDevitt presented his petition applying for the relief provided for insolvent debtors by the then existing insolvent laws of this state; he exhibited no schedules of his estate, effects, or property; he produced no statement of debts due by him, containing the names of his creditors, the amount due each and the nature and character of the same; he made no statement of the causes of his insolvency or the extent of his losses; he did not then, nor has he since then, taken any steps whatever toward obtaining the relief granted or a discharge under the said laws. The time for hearing argument on the exceptions was fixed by Judge Cummings with full knowledge and no doubt the approval of counsel on both sides as is the usual method and our custom in proceedings of like nature in this county. The fact that the defendant's uncle died the day or evening before the day fixed for the hearing is not a good reason under the law, why he or his counsel should not have appeared before the court at the time appointed to proceed with his cause, or, at least, move the court for a continuance of the proceedings to some future date. Their failure to do so was a violation of the condition of the bond which provides that the defendant shall comply with all requirements of said law, and abide all the orders of the court in that behalf. By this default on the part of the defendant the creditor's interest in the said bond became vested and the court is without power under the law to interfere.

In Re Insolvency of Koehler, reported in 5 Luzerne

Legal Register 525, a somewhat parallel case, Judge Rice said, "This is a hard case, and if we could find that we have any discretionary power to relieve the petitioner and his surety, we should not hesitate to exercise it. The facts are as follows: The petitioner, on April 23, 1890, gave a bond with surety, conditioned as prescribed by the Act of 1836, to appear at the next term of court and apply for the benefit of the insolvent laws. The next term began on May 12, and continued during two weeks. By direction of his counsel he appeared on May 12 in court, but as his counsel did not appear, he, not knowing what to do, returned home and took no further steps in the matter, expecting to hear from his counsel whenever he was needed. The term expired without anything further being done in the case, and on May 28 the petitioner made this application to be relieved from the default. It should be remarked that the failure of the counsel to appear and present his client's petition for discharge was due to no negligence, but the severest domestic affliction.

"In most cases the court has power to relieve a suitor from the consequences of a default occurring under such circumstances, but it is too well settled to admit of argument that we have not power to do so in a case of this kind. The condition of the petitioner's bond was that he should appear at the next term of court, 'and then and there present his petition for the benefit of the insolvent laws,' etc. By reason of his failure to present his petition the condition of the bond was broken, and there is no discretionary power in the court to relieve him from the plain provisions of his contract. The bond is not an engagement with the court, but an obligation prescribed by statute for the benefit and as a security for creditors. When the bond is forfeited, said Judge King, 'the creditor's interest in it becomes vested, and we possess no power to take from him an advantage given by positive enactment.' *Claxton's Case*, 1 Ash. 102. Gibson, Ch. J., said: 'But there is no discretionary power anywhere to relieve against the contract of one whose responsibility has been incurred, not by an engagement to the court attended with peculiar incidents, but by an obligation on conditions prescribed by a statute, in which the party who undertakes for performance by the prin-

cipal is but a surety, and not bail in the proper sense of the word.' Kelly v. Stepney, 4 W. 69. We need not encumber this opinion with further quotations. The doctrine above stated, so far at least as insolvent bonds are concerned, is sustained by an unbroken line of decisions of which we cite but a few. Heilner v. Bast, 1 P. & W. 267; McDonough's Case, 37 Pa. 276; Bartholomew v. Bartholomew, 50 Pa. 194; Commonwealth v. Grimes, 116 Pa. 450; Hunter v. Keller, 1 C. C. R. 617; Taylor's Case, 1 Pears. 191; Kindt v. McDonald, 5 W. N. C. 38. We reluctantly conclude that we have no power to relieve the petitioner."

In McDonough's Case, 37 Pa. 275, it was held: "When an insolvent debtor gives bond to appear at the next term of the Court of Common Pleas, and present his petition for the benefit of the insolvent laws, the condition of the bond must be complied with, and a petition with the statements required by law must be presented within the next term, otherwise his bond will be forfeited. Where a time has been fixed by court for hearing the petitioned and his creditors, the petitioner, if he would save his bond, must either ask for a discharge, surrender himself to jail, or procure another day for final hearing. The statute requires of him an active compliance with its provisions." The doctrine of this case was followed and approved by Mr. Justice Gordon in Rowand v. Smiley, 96 Pa. 165.

In considering the case of Bartholomew v. Bartholomew, 50 Pa. 194, the Supreme Court through Mr. Justice Agnew say: "It is not difficult to determine this case, if we keep in view the provisions of the Insolvent Law, and the purpose of the bond given to obtain its benefit. The first section of the Act of 16th June, 1836, gives power to grant relief to insolvent debtors, in the manner provided. The mode is for the debtor to come into court, present his application, ask a hearing, give notice of it to his creditors, exhibit the state of his affairs, take the required oath, make an assignment, and ask for his final discharge. In all this, he is the actor and only one to set in motion the machinery of the law which is to result in his discharge. His creditor performs no part of it, is not bound to appear, and cannot prevent his discharge except by showing that he is not a fit subject of relief. He may

appear to do this, but it is not to do an act in furtherance of the discharge but against it. The purpose then is relief, the provisions of the law must be pursued, and the debtor is the only one who sets them in motion and keeps them moving. The bond is but a part of the machinery. Its purpose is temporary enlargement while prosecuting the necessary measures for relief; and to enable him to prosecute them with more convenience than he could under confinement. Its purpose is also to secure his creditor by compelling him to proceed towards his discharge in due course of law, or to return himself into prison in case he fails to procure his discharge. This being the purpose, it is clear that no construction of the bond can be right which postpones the discharge indefinitely, and at the same time prevents his return into the power of his creditor." In *O'Donnell v. Gordon*, 12 Super Ct. 23, the Superior Court say: "The debtor is the actor in insolvency proceedings. It is his duty promptly to set the machinery of the court in motion and diligently to keep it in motion. He is the one who is seeking the relief and he must pursue it. The creditor has nothing to do with it." This doctrine is followed in *Commonwealth v. Grimes*, 116 Pa. 450, where it is also held that "the bond of the petitioner is not an engagement to the court, but an obligation prescribed by statute as a security for creditors, and there is no power in the court to relieve from its provisions." *Frick v. Kitchen*, 4 W. & S. 30, is authority for the doctrine that "a petitioner for the benefit of the insolvent law, whose application has been rejected, in order to relieve his security, must surrender himself upon the day of his rejection; a subsequent surrender is ineffectual, and an escape from it would not charge the sheriff with his debt." The Superior Court held, in a majority opinion in the case of *Marks v. Wilenski*, 31 Super Ct. 177, that "the surety on the bond of an insolvent debtor is not relieved from liability by the fact that the insolvent surrendered himself for imprisonment eight days after the order against him was made, although no time was fixed in the order for the surrender and the insolvent had no knowledge that the order had been made until his counsel informed him of the fact, and he then immediately surrendered himself."

The defendant having failed to abide the order of

the court of October 7, 1912, and having failed to appear and proceed with the matters pertaining to his said application on the 21st day of said month, in compliance with said order, the said defendant violated the undertaking in the bond or obligation contained and the interests of the creditor in said bond became vested.

And now, May 22, 1916, in view of what is hereinabove contained, and in the light of the foregoing authorities, judgment is directed to be entered in favor of the plaintiff and against the defendants for the sum of one thousand dollars with interest from the 21st day of October, 1912.

On June 12, 1916, an appeal to the Superior Court was taken in this case.

LOUX CREAMERY CO. v. TICE ET AL.

Corporations — Directors — Illegal Dividends—Equity—Acts of July 18, 1863, P. L. (1864) 1102, and April 29, 1874, P. L. 73.

The liabilities of officers and directors of a corporation, delinquent in the performance of their duties as such, must be determined in the mode provided by the Act of July 18, 1863, P. L. (1864) 1102, and April 29, 1874, P. L. 73.

They are not assets of the corporation so as to give a general receiver authority to enforce them through a proceeding in equity.

In the Court of Common Pleas of Lehigh County, sitting in equity. No. 1 October Term, 1915. Loux Creamery Company, in hands of Earl V. Ryan, Receiver, v. Vallie G. Tice, et al. Bill in Equity.

Frank Jacobs and M. P. Schantz, for Plaintiff.

George W. Aubrey, Butz & Rupp, Ira T. Erdman and Calvin E. Arner, for Defendants.

Groman, P. J., October 2, 1916. The receiver of the Loux Creamery Company, a Pennsylvania corporation, filed his bill in equity, alleging that certain unearned dividends were paid by the board of directors from time to time, and that other payments were made negligently and by connivance by the defendants as directors of the corporation.

After taking the testimony of the complainant, the

court, under Rule 68 of the equity rules, entered a decree of dismissal without hearing evidence on behalf of the defendants. The plaintiff filed a motion to change the decree dismissing the bill.

The one question going to the marrow of the controversy, if the jurisdiction lies, is—have the directors of this corporation, in the performance of their duties, exercised reasonable and ordinary care, skill and diligence in conducting the business of the corporation? If they did, there could be no recovery. During the taking of the testimony, it was conceded that certain of the directors could not be held liable, but an effort was made to bring home liability on the part of Wilson M. Loux, a director, book-keeper and the manager of the corporation. While an appearance of wrong-doing may be established, this with nothing more, would not be sufficient to establish fraud; that fraud must be proven and cannot be presumed is so evident a legal maxim that a citation of authorities would be superfluous.

It is hardly worth while, however, to pursue the foregoing inquiry any further as we have legislation in Pennsylvania indicating the procedure to be followed to establish the liability of the officers and directors of a corporation, delinquent in the performance of their duties as such. Sections 41 and 42 of the Act of July 18, 1863, P. L. 1102, 1864, read as follows: "Sec. 41. No stockholder, or officer in such corporation, shall be held liable for its debts, or contracts, unless a judgment is recorded against it, and the corporation shall neglect, for the space of thirty days after demand made, on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied.

Sec. 42. After the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity, in behalf of himself, and all other creditors of the corporation, against it, and all persons who were stockholders therein at the time of the commencement of the suit in which said judgment was recovered, or against all the officers liable for its debts and contracts, for the recovery of the sums due from said corporation, to himself and such other creditors, for which the stock-

holders or officers may be personally liable, by reason of any act or omission, on its part, or that of its officers, as stated in preceding sections of this act, setting forth the judgment and proceedings thereon, and the grounds upon which it is expected to charge the officers, or stockholders, personally."

The Act of April 29, 1874, P. L. 73, Section 39, reads as follows: "If the directors of any company declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office: Provided, That the amount for which they shall be liable shall not exceed the amount of such dividend, and if any of the directors are absent at the time of making the dividend, or object thereto, at said time, and file the objections in writing with the clerk of the company, they shall be exempted from such liability."

Relative to the matters under consideration, and having the above legislation in mind, it may be illuminating as well as instructive at this time to quote from *Childs v. Adams*, 43 Pa. Sup. Ct. Page 239 (1910), "Where the president and treasurer of a corporation are permitted to control and manage the whole business of a corporation without any interference by the directors or stockholders, and they declare and distribute dividends in good faith out of what they suppose is profits, although the company is in fact insolvent, they cannot be compelled to pay back the sums thus distributed to the corporation by a bill in equity filed against them by the general receiver of the company. Their only liability is to the creditors who must first have the amount of their indebtedness adjudicated in an action against the corporation, and then file their bill for themselves and other like creditors against the officers who may have made the illegal payments.

The liabilities of the officers and directors of a corporation specially imposed upon them by the statute, are not assets of the corporation so as to give a general receiver authority to enforce them."

The dismissal of the bill must be sustained for want of jurisdiction.

Now October 2, 1916, motion to change the decree dismissing the bill in the above cause, dismissed.

HARRIET ASHBY, EXECUTRIX, ETC., v. BUTZ.

Contract — Completed Contract — Partnership — Promissory Notes.

An agreement to continue a partnership under the same terms as then existing, with the exception of certain notes showing the indebtedness between the partners, which were to be cancelled, the whole to be thereafter put in writing, is not a completed contract, and, therefore, recovery can be had on said notes.

In the Court of Common Pleas of Lehigh County. No. 14 January Term, 1916. Harriet Ashby, Executrix, etc., of Henry S. Keck, deceased, v. Harvey E. Butz, Assumpsit. Rule for New Trial.

Fred E. Lewis and Allen W. Hagenbach for Plaintiff.
George M. Lutz, for Defendant.

Staples, P. J., Forty-third Judicial District, specially presiding, October 9, 1916. On the first day of April, 1910, the decedent, Henry S. Keck, and Harvey E. Butz, the defendant, entered into written articles of agreement of co-partnership for a period of five years. Butz, not having the requisite amount of money, borrowed Thirty-one Hundred and Eighty-four Dollars and Eighteen Cents (\$3184.18), of Keck, and gave him a note therefor. Afterwards, by reason of negotiations, Keck gave his note to Butz for Fifteen Hundred Dollars (\$1500). About the time of the expiration of the contract of partnership, Butz became dissatisfied, not receiving out of the partnership what he expected, or thought he ought to have, and he informed Keck of the fact; and with reference to the same, he testified as follows:

Q. Mr. Butz, towards the close of the agreement, what transpired with reference to the notes, the one you gave him for \$3184.18 and the one which he gave you?
A. They were to be cancelled, the notes destroyed, and a new agreement entered into.

Q. Notes destroyed and new agreement entered into? A. Yes sir.

Q. Tell the agreement. A. I told him our agreement was nearly expired, and we ought to get a new one. I was not satisfied with the way business was going. I said it looks as though we were where we started five years ago. Mr. Keck said, we will call off this agreement; if we, he meant——

Q. Did you have discussions on more than one occasion? A. Yes sir.

Q. Mr. Keck spoke to you and you spoke to Mr. Keck? A. Yes, sir.

Q. What did Mr. Keck say and what did you say? A. It was around April the first that he said we will have a new agreement and start in fresh,—that meant.

Mr. Hagenbach:

Not what it meant. A. He said we will destroy the notes and I said shall I attend to it, and he said I will see Fred to-night; the next day I asked did you see Mr. Lewis; he said no he didn't. I kept talking about the notes and the new agreement; he went and asked a lawyer what the case would be when the agreement was out of date——

Mr. Hagenbach:

Objected to.

The Court:

No.

Q. You can report what he said the lawyer said? A. He said follow the agreement, as long as there is no new agreement; follow the old agreement; the agreement had expired and he said follow that just the same way as long as there is no new agreement.

The Court:

Was there ever a new agreement? A. No, never.

Q. You say that was about April first? A. It was before April first.

Q. What did you do after April the first? A. After April the first, I continued business the same as before; Mr. Keck was not able to be around.

Q. What was his condition April first, 1915? A. Bad, bad, very bad.

Q. Had he been in attendance at the store during the latter part of the term? A. No, no.

A. I told him I wasn't satisfied with the way business was conducted; and he said well, he said what can

we do? I said there has to be other management to make it a success. I told him we were where we were five years ago, no further. He said these notes we will call off and enter into a new agreement; he was going to do it and he failed to do it.

A. He said we will start a new agreement, call off the notes together with the interest and start in fresh,—that meant—

The Court:

You cannot say that.

Q. Was anything said as to who should draw the agreement? A. Mr. Lewis was to draw up the agreement.

Q. Did Mr. Keck say anything with reference to seeing him? A. He said he would see Mr. Lewis that night.

Q. Did you speak to him with reference to that again afterwards? A. Yes sir.

Q. What did he say? A. I asked him the next morning if he had seen Mr. Lewis; he said no; he said yes I will; on account of sickness I guess he didn't see Mr. Lewis.

Cross Examination:

Q. Did you ever enter into a definite agreement with him as to what the new terms of the continuing agreement should be? A. Yes sir.

Q. All the details? A. All the details.

Q. What were the details? A. To have a new agreement made, copy of old; only notes together with interest should be destroyed.

Q. In other words, he was to give you the difference between \$1500 and \$3100? As a present? A. I earned it.

Q. You said in your examination in chief that until you could arrange new terms the old agreement was to be in force?

Mr. Lutz: Objected to.

Q. Did you continue under the old arrangement? A. Yes sir.

Q. Didn't your lawyers advise you to continue under the old arrangement? A. As long as there is no new one we have to follow the old one.

Before anything definite was done in the way of the

preparation of the new agreement, the said Henry S. Keck died, his executrix brought suit to recover the difference between the two said notes.

The contention of the defendant at the trial, was that there was a completed contract entered into by the decedent and the defendant whereby both notes were to be cancelled, and a new agreement of five years entered into, the terms of which were to be exactly the same as the agreement first mentioned in this opinion, and the mere fact that it was not reduced to writing and signed, did not militate against the fact of a full and complete contract between the parties, which included the cancellation of the notes.

This court did not agree with that contention, and instructed the jury to render a verdict in favor of the plaintiff for the difference between the notes, which it accordingly did.

To constitute such a contract as contended for by the defendant, it was necessary for the minds of Keck and himself to have fully met and for both of them to have treated the transaction, as far as the new agreement was concerned, closed. It was to be one transaction, the notes cancelled, and a new agreement entered into. This was never done. Keck simply made a proposition to do something that for some reason or other never was done, and which the defendant never treated as having been agreed to be done. He never demanded the cancellation of the notes; he never brought his note to Keck and asked for the cancellation of the two notes; but, on the contrary, he treated the whole matter as though there were still something to be done. He did not refuse to continue under the old agreement, but remained in the store, and continued to work under it, waiting for the new agreement to be drawn up, and executed. In other words, he treated the negotiation as not fully completed, but as depending upon something still to be done. This clearly appears, from his statement of what occurred, viz:

A. He said we will destroy the notes and I said shall I attend to it, and he said I will see Fred to-night, the next day I asked did you see Mr. Lewis, and he said no he didn't. I kept talking about the notes and the new agreement, he went and asked a lawyer what the case would be when the agreement was out of date——

Q. You can report what he said the lawyer said?

A. He said follow the agreement as long as there is no new agreement, follow the old agreement; the agreement had expired and he said follow the old agreement just the same way as long as there is no new agreement.

The Court:

Was there never a new agreement?

A. No. Never.

A. After April first I continued business the same as before. Mr. Keck was not able to be around.

Q. You said in your examination in chief that until you could arrange new terms, the old agreement was to be in force?

Q. Did you continue under the old agreement? A. Yes sir.

Q. Didn't your lawyers advise you to continue under the old arrangement? A. As long as there is no new one, we have to follow the old one.

The defendant did not allege that he worked on because he considered the contract between them fully agreed upon, but testified that he worked on under the old agreement until the new agreement was made, and that he repeatedly saw Keck and urged him to have said agreement prepared,—that Keck was sick, and we gather that that is the reason alleged for the failure to prepare and execute the new agreement.

We have presented defendant's case in the most favorable light. He was allowed to testify because the plaintiff called him for cross examination. The payee of the notes was dead, and could not appear in court to give his version of the transaction, but giving full credence to defendant's statement, and that of his witnesses, who were his employees in the store, we are of the opinion that what took place did not constitute a full, complete and binding contract.

And now, October 9th, 1916, for the reasons above stated, rule for new trial in the above case is discharged.

SELMAN SWANSON v. JOHN C. SHARKEY.*Workmen's Compensation—Burden of Proof—Evidence.*

The Pennsylvania Workmen's Compensation Act has in no way relieved a claimant of the burden of proof. A claimant must assume the burden of presenting such testimony as to material allegations in the petition as will establish a case and put the defendant on the defensive.

A defendant's responsibility is not established by proving an accident and subsequent death. There must be such evidence showing death as a result of the accident, that, in the absence of any intervening cause, will lead to the conclusion that the accident caused the death.

Appeal from decision of Referee Snyder, Sixth District. Workmen's Compensation Board, Claim Petition No. 234.

Mackey, Chairman, July 7, 1916.

The defendant has appealed from the findings of fact and conclusions of law of the referee on the ground that the claimant's husband did not meet his death as a consequence of an injury received while in the employ of the defendant. This squarely raises the question with the board as to whether or not the referee has drawn an erroneous conclusion from the testimony presented before him.

We have repeatedly said that it is not our disposition to reverse a referee in a case that involves the credibility of witnesses unless the record itself clearly discloses the fact that for some reason the referee has been led into a manifest error or has clearly misinterpreted the testimony and rendered his decision contrary to the weight and against the preponderance of the same. In the present case, we find that the claimant's husband was in the employ of the defendant both before and on the 31st day of January, 1916. The defendant has admitted of record that the accident happened practically as set forth in the claim petition, namely, that the claimant while in the employ of the defendant as a bar-tender fell through an open trap-door and by thus falling broke his left arm, cutting his forehead and chin and sustaining other minor injuries. The issue raised by the defendant in this appeal has necessitated a very careful examination of the medical testimony that was offered for the consideration of the referee. Dr. Burkheimer testified that he had treated

the deceased professionally about January 1st last and that he had attended him about two years before that and upon both occasions prescribed for chronic heart trouble; in his opinion, however, it had not incapacitated the deceased from work. He said that the deceased came to his office for treatment and that he was so ill on several times that he placed him in bed; the deceased remaining there not longer than three days at a time. The deceased in the doctor's opinion was not a strong man.

Dr. Carlisle testified that he was called to attend the deceased just after the accident in question. He found that he had sustained several cuts on the face and forehead and on the chin, the right hand was cut and there were several cuts on the body and a fractured humerus. At the time the deceased was weak from the loss of blood and the shock of the accident. He sent the deceased to the hospital where he found a broken humerus. This physician had treated the deceased about four years before that and had found him in a generally weakened condition and testified that at that time the patient had "bad heart muscles."

Dr. J. W. Hawes had treated the deceased three or four years previous to the injury for chronic valvular heart trouble and rheumatic condition of his feet. The board finds nothing upon the notes touching the qualifications of this physician which would justify addressing to him any hypothetical question touching the cause of the deceased's death.

Dr. W. S. Wheeling is the superintendent of the Windber Hospital in which the deceased was a patient and where he died. He testified that the deceased was brought to the hospital on January 31st, 1916, 3:15 P. M. with a fractured neck of the left humerus, lacerations of the chin and forehead and a wounded right hand. In order to reduce the fracture, the patient was given an anesthetic but this had to be administered in a very small amount because of the condition of the man's heart.

The doctor pronounced the deceased's heart as "very bad." This witness testified that the patient presented all the characteristics of chronic alcoholism. This official of the hospital testified that the man was cured of his injuries but after they allowed him to leave his bed he became demented, (evidently an error of the stenogra-

pher, probably should be discontented) and said he "wanted to go home." The witness said that the physicians of the hospital did not want him to go home because they were fearful that he would "go on a spree." The doctor testified that on March 12th he noticed symptoms of a collapse due to heart disease. This physician listened to his heart and could scarcely hear anything. His pulse was very faint. The witness testified that some of the physicians at the hospital believed that Swanson had a leaking valve of the heart. It was his opinion that he was suffering from an acute cardiac dilation.

The witness testified that the deceased had recovered from the accident and that the death by heart disease was not superinduced by the accident as there was a period of one month and thirteen days from the date of the accident to the time of the death. Before the death the patient was up and about the hospital and had been so for two weeks before his death.

Dr. J. W. Boyce was called as an expert witness. He testified that he had been practicing medicine for twenty-four years, is a graduate of Western Pennsylvania Medical College and qualified as an expert on the heart and lungs. He assumed from the testimony that he had heard that the deceased had suffered with heart disease for several years, that he received a severe injury that would not directly affect the heart, that his physician sent him to the hospital and warned the attending physician as to his condition.

The medical staff at the hospital after examining this organ did not believe it was sufficiently strong or in a proper condition to administer chloroform and as a consequence they watched the heart very closely for six weeks. This witness testified that it was very plain to him that the injury did not affect the heart and that the patient did not die as a consequence of the accident.

The widow, the claimant, testified that her husband had only been employed at half the time a considerable length of time previous to the accident. She admitted under cross-examination that a number of years ago her husband complained of his heart and while he had been under the treatment of the doctor whose testimony had been previously referred to he was not able to work very

much and that the deceased was rather a steady drinker.

The Pennsylvania Workmen's Compensation Act has in no way relieved the claimant of the burden of proof. A widow who sets up a claim against a defendant for compensation for the death of her husband must necessarily assume the burden of presenting such testimony as to material allegations in the claim petition as will establish her case and place the defendant on the defensive. (See Bulletin No. 2, Page 9, Burden of Proof.)

In this case because of the admissions by the defendant the claimant was relieved of this burden with the exception of the most material and important allegation, namely, that her husband's death was due to the injuries received. It is not enough to establish the defendant's responsibility to simply prove an accident and a subsequent death. There must be such evidence showing death as the result of injury that in the absence of any intervening cause we will be led to the conclusion that the accident caused the death.

In the present case this burden has not been met by the claimant. All the reliable and reasonable testimony of record is quite to the contrary, namely, that his death was not a direct result of the injury and that the deceased died of heart disease not superinduced by the injuries.

To arrive at another conclusion we would be compelled to absolutely ignore and set aside the testimony of reputable physicians whose evidence stands uncontradicted upon the record. We must be controlled by the evidence entirely. Neither sentimentality nor sympathy can find a lodging place in our decisions. We must determine the issues involved in the case by the record that comes before us; therefore, we cannot sustain this award in the face of this testimony and accordingly reverse the referee and set aside the award.

COMMONWEALTH OF PENNSYLVANIA EX REL.,
WILLIAM CASEY, MILTON WELLER AND
CHARLES BERCAW, COMMISSIONERS OF
NORTHAMPTON COUNTY, v. R. J. CUNNING-
HAM, STATE HIGHWAY COMMISSIONER OF
THE COMMONWEALTH OF PENNSYLVANIA.

Highways—Maintenance at the Expense of the State—Highway Commissioner—Duties—Control of by Court—Acts of May 31, 1911, and July 22, 1913.

Roads included in the system of State highways, established under the Act of May 31, 1911, and roads added to that system by the Act of July 22, 1913, P. L. 498, become maintainable by the Commonwealth only when taken over by the Highway Department and the expense of their care and maintenance assumed.

The work of constructing, maintaining and repairing the roads which constitute the system of State highways has been entrusted by law to the State Highway Commissioner. He is required in the performance of his duties to exercise his judgment as to the time of taking over a road and assuming the expense of its care, and all other matters involved in the construction and proper maintenance of the highways. He cannot be interfered with nor can his action be controlled by a court, unless it clearly appears that he has abused his discretion.

Mandamus. C. P. Dauphin County, No. 78 Commonwealth Docket, 1911.

Fox and Geyer, for Plaintiff.

William H. Keller, Deputy Attorney General, for Defendant.

Kunkel, P. J., November 2, 1916. This is a proceeding brought at the instance of the Commissioners of Northampton County to compel the State Highway Commissioner to construct and maintain, at the expense of the Commonwealth, the road in that county leading from Nazareth by Newburg and Hecktown to Bethlehem. The case has been submitted to us by the parties on the demurrer to some of the allegations contained in the return and on the traverse to the others. Trial by jury has been waived. The following facts appear from the pleadings and the evidence:

FACTS.

Prior to July 22, 1913, the road in question was a county road and the expense of maintaining it was required to be borne by Northampton County, under the

administration of the County Commissioners. On June 1, 1915, and at the time of the commencement of this proceeding, it was in an almost impassable condition and greatly in need of immediate repairs. By the Act of July 22, 1913, P. L. 498, it was adopted as a State highway on June 1, 1915, and was added to the list of roads constituting the system of State highways established by the Act of May 31, 1911, P. L. 948, under the title "Route No. 297," that being the number immediately following the last numbered route mentioned in the Act of 1911. However, the State Highway Department has not taken over the road or assumed its maintenance or care.

The appropriation for the two fiscal years beginning June 1, 1915, for the maintenance of roads was not sufficient to maintain properly all the roads which belonged to the system of State highways and for the maintenance of which the State Highway Department had already become responsible. The moneys appropriated were apportioned to the maintenance, repair and construction of the highways by the State Highway Department as equally and uniformly in the several counties of the State as conditions allowed. In making the apportionment and carrying on the work of maintenance, the Highway Commissioner and the officials under him had regard to the condition in which the highways were found, and the comparative necessity of their repair. Of the moneys appropriated, Northampton County has received or is to receive for the repair and maintenance of the roads of that county, more than its share, whether calculated upon the basis of an equal division between all of the counties or upon the basis of a division in proportion to the mileage of roads therein maintainable by the State Highway Department.

DISCUSSION.

The Act of July 22, 1913, P. L. 498, provides that the various sections of the public roads in the State described therein "shall respectively be adopted June 1, 1915, by the Commonwealth as State highways." The effect of this provision, as we understand it was to introduce those roads at the time stated into the system of State highways established by the Act of May 31, 1911, P. L. 468. Among the roads mentioned is the road now in question designated therein as Route No. 297.

Plaintiff contends that when the road was adopted as a State highway it became maintainable thereafter at the expense of the Commonwealth, the county from that time being relieved of that burden. If there were nothing more in the act than the provision adopting the road into the system of State highways established by the Act of 1911, the contention might have weight, but the act also provides that the roads therein adopted "shall be constructed and maintained at the sole expense of the Commonwealth under the provisions of present or future laws governing main State highways." The "present law" referred to evidently was the Act of 1911 which established the State Highway Department and the system of State highways. It is thus expressly directed that the roads adopted into the system of State highways by the Act of July 22, 1913, are to be governed as to their construction and maintenance at the expense of the Commonwealth by the provisions of the Act of 1911 relating to the construction and maintenance of the roads by the Commonwealth belonging to the system under that act. The Act of 1911, in Section 5 thereof provides: "the highways designated in this act, as State highways, shall be taken over by the State Highway Department from the several counties or townships of the State, and when so taken over shall thereafter be constructed, improved and maintained by the State Highway Department at the expense of the Commonwealth. Said highways shall be taken over, in whole or in part from time to time, as circumstances and conditions will permit * * * the State Highway Commissioner shall, before taking over any highway under the provisions of this act, give notice in writing to the proper officers of the county or township in which said highway shall lie of his intention so to do, and of the date when the State Highway Department will assume the maintenance and care thereof. The work of maintenance, repair and construction of said State highways shall be commenced and carried on as equally and uniformly in the several counties as conditions will allow." From these provisions it appears that the roads constituting the system of State highways under the Act of 1911, were to be maintained at the expense of the Commonwealth when the State Highway Department should take them over and assume their maintenance and care.

It is quite clear, therefore, that as the roads under the Act of 1911 did not become maintainable by the State Highway Department merely because of the fact that they belonged to the system of State highways, but only became so when they had been taken over by the Department and their care and maintenance assumed, so the roads adopted into the system by the Act of 1913 did not become maintainable by the Department by the fact of their adoption into the system. They too only become maintainable by the Commonwealth when taken over by the Department and the expense of their care and maintenance assumed. The roads adopted by the Act of 1913 are in the same position with respect to their care and maintenance by the Commonwealth as those belonging to the system under the Act of 1911. As the Highway Department has not assumed the maintenance of the road in question, it follows that the Highway Commissioner is not responsible for its care or the Commonwealth liable for the expense of its maintenance. When it has been taken over and its care and maintenance assumed by the Highway Department will Northampton County be relieved of the expense thereof.

Moreover, the work of constructing, maintaining and repairing the roads which constitute the system of State highways at the expense of the Commonwealth has been entrusted by law to the Highway Commissioner. He is required, in the performance of his duties, to exercise his judgment on the questions of the time of taking over a road and assuming the expense of its care, of the necessity for repairs, and of the time for repairs, and on all other matters involved in the construction and proper maintenance of the highways. He cannot be interfered with nor can his action in anywise be controlled by the Court, unless it clearly appears he has abused his discretion. This has not been shown in the present case. On the contrary, it appears he has made the apportionment and distribution of the funds provided for the maintenance and care of the highways, in the manner which the statute directs, that is, he has carried on the work equally and uniformly in the several counties of the State, as conditions allowed. We cannot find any circumstances existing which permitted or required him to take over, in whole or in part, the particular road complained

of. The one circumstance of controlling influence which justifies his refusal to assume the expense of its maintenance was the lack of funds to carry on the work.

For the reasons stated, judgment is directed to be entered in favor of the defendant and against the plaintiff, unless exceptions be filed within the time limited by law.

BRIGHT AND WIFE v. PENNSYLVANIA RAILROAD COMPANY.

Negligence—Contributory Negligence—Province of Court and Jury.

1. Contributory negligence can be declared by the Court in clear cases only.

Negligence—Railroads—Passengers—Handling Crowd at Station—Train Gates.

2. It is not per se contributory negligence for passengers awaiting the departure of their trains to do so at the appropriate gates instead of remaining in the waiting-room.

3. A railroad company, undertaking in the course of its business to handle a large number of people at a station, is bound to make reasonably adequate provision for their timely information, guidance and direction, so as to avoid confusion and, if possible, the dangers incident to haste, excitement and crowding, and to use reasonable care in moving the people collecting together for the purpose of protecting them from harm likely to arise from the usual conduct of a crowd striving to reach the cars.

Negligence—Measure of Duty Under Contract.

4. A duty assumed under a contract relation and wrongfully neglected may be made the basis of an action for negligence, and when it is, the nature and measure of the duty involved are those which result from the contract.

Negligence—Railroads—Measure of Duty Towards Passengers—Use of Station of Another Railroad.

5. When a railroad company undertakes to carry persons from one place to another and back again, it obligates itself to arrange for their reasonably safe unloading and reloading at the point of destination; and if at that point it chooses to avail itself of a station belonging to another corporation and manned and controlled by the latter's employees, the railroad company assumes responsibility for the exercise of due care on their part as, for the time being and between it and its passengers, its own agents.

In the Court of Common Pleas of Berks County. No. 5 June Term, 1915. Verdict for plaintiff. Rules by defendant for new trial and for judgment non obstante veredicto.

Cyrus G. Derr for Defendant and Rules.

Joseph R. Dickinson and Walter G. Steininger for Plaintiff.

Opinion by Endlich, P. J., November 6, 1916. In this action of trespass the plaintiffs claim and have secured verdicts for damages for an injury alleged to have been sustained by Mrs. Bright through the negligence of the defendant company. The latter sold to plaintiffs excursion tickets from Reading to Washington, D. C., and return, the excursion being gotten up, advertised and managed by defendant. Between Philadelphia and Washington the journey was over another railroad controlled by defendant, and the arrival and discharge of the passengers at Washington, as well as their re-embarkation there upon the home-bound train, took place in a terminal station owned and controlled and operated by a different corporation, the Washington Terminal Co. In this station there is a waiting-room for the convenience of persons (among others) awaiting the departure of trains, of which due announcement is made in that room. The waiting-room opens upon a large space, or "concourse," separated by a fence or barriers from the numbered tracks on which trains arrive and depart, with gates leading to them and distinguished by signs declaring the destination of the trains standing on the tracks. The plaintiffs came to the station some time before the scheduled departure of their train and remained for a while in the waiting-room. With still some time to spare, they inquired at the proper office concerning the gate at which the Reading train was to be, and being directed to a certain gate went there and waited, standing in line with about 40 others. In the meanwhile a sign was put up at another gate indicating that the Schuylkill Division Accommodation (Reading being in that division) would leave there, some excursionists were directed to that gate, and a large number (estimated as between 700 and 900) collected about it. A few (testified

to as two) minutes before the appointed time it was announced that the Reading train would leave at the gate at which plaintiffs were and a sign designating it as the express for Reading, or for Reading only, was then for the first time there put up. Thereupon the crowd at the former gate at once rushed over to the other where plaintiffs were, and Mrs. Bright, unable to extricate herself from the crush, attended with pushing and some violent conduct, was pressed against a rail with such force as to render her unconscious and cause her to fall, and was severely hurt. There were no officers to instruct, guide or control the movement of the persons assembled at the second gate above spoken of, except one or possibly two who tried to make their way through the crowd, but proved powerless alone to restrain it.

The facts narrated seem to comprise the material ones gathered from the admissions of the parties, from the undisputed evidence and from what is necessarily implied in the finding of the jury under the charge: see *Mintzer v. Hogg*, 192 Pa. 137, 144; *Smith v. Shields*, 194 id. 635, which left to them the determination of the questions of defendant's negligence and plaintiffs' contributory negligence. The main contention on the part of defendant in support of both of these rules is, that no negligence causing Mrs. Bright's injury has been brought home to the defendant company, and that the plaintiffs' case discloses contributory negligence in them, to be pronounced by the Court as a matter of law.

Taking up first the position last mentioned, it is to be observed that it is predicated upon the theory that it was the plaintiffs' duty to remain in the waiting-room until the train was there announced as ready to be boarded, and that, at all events in the absence of any suggestion of insufficiency in the number of cars composing the return train to accommodate all the excursionists, it was a breach of that duty for plaintiffs in advance of such announcement to exchange their places of safety in the waiting-room with one of danger (as it turned out) at the gate, the likelihood of crowding at the same being, it is asserted, as apparent to the plaintiffs as to the defendant. The settled rule is that contributory negligence can be declared by the Court in clear cases only: *Mortimer v. Traction Co.*, 216 Pa. 326; *Joyce v. R. R. Co.*,

230 id. 1; Thorne v. Transit Co., 237 id. 20; Schmidt v. Ry. Co., 244 id. 205. In the face of what is known to everybody (and therefore to the Court: Rauch v. Commonwealth, 78 Pa. 490, 494) concerning the customary and universal practice in large railway stations, it assuredly cannot be laid down that it is per se contributory negligence for passengers awaiting the departure of their trains to do so at the appropriate gates instead of remaining in the waiting-room. If it were not generally understood that they will and may do so, there would be little, if any, need for a "concourse" such as is provided at the station here spoken of, and manifest impropriety in allowing free ingress and egress between it and the waiting-room. The view most favorable to the defendant would seem to be that the question whether plaintiffs' action was prudent or not under the circumstances was one for the jury, to whom it was submitted. And this disposes of the allegation that there was error in the refusal of defendant's first point (without reading to the jury: see Woeckner v. Motor Co., 187 Pa., 206, 208). It may be noted here that the decision in Begley v. R. R. Co., 201 Pa. 84, referred to by defendant, as well as that in Flanagan v. R. R. Co., 181 Pa. 237, cited in that decision, does not say that passengers are obliged to remain in the waiting-room up to the announcement of the readiness of their train. In those cases the point decided was that their place is in the waiting-room or upon the platform provided by the company and not upon the tracks,—a question very different from any here arising.

Was there proof of negligence in defendant company? The contention of plaintiffs was that there was such proof in the fact of encouraging and permitting the large crowd to gather where it did, in the confusing tendency of the signs displayed at the respective gates, and in the lack of adequate arrangements and a sufficient force of officers for directing and controlling the movement of the crowd when the Reading train and gate were announced. It is urged by defendant that the evidence of all this was erroneously admitted because the plaintiffs' declaration does not specify it as constituting the negligence charged against defendant. The declaration, however, does say that defendant "negligently and carelessly permitted" a large number of persons to assemble

before the gate which was not the gate to the Reading train, and to rush thence to the gate at which plaintiffs were standing, etc. The details of how the defendant "negligently and carelessly permitted" this to happen were matters of proof, not required to be set forth in the declaration. This being so, there is hardly any force in the criticism of the admission of the evidence referred to.

That a railroad company, offering or called upon and undertaking in the course of its business to handle a large number of people at a station, is bound to make reasonably adequate provision for their timely information, guidance and direction, so as to avoid confusion and, if possible, the dangers incident to haste, excitement and crowding, and to use reasonable care in moving the people collecting together, for the purpose of protecting them from harm likely to arise from the usual conduct of a crowd striving to reach the cars,—all this, as well as that the inquiry whether that duty has been performed by the company is ordinarily for the jury upon the evidence and circumstances of the case, is plain from the rulings and the reasons given therefor in such decisions *Muhlhouse v. Ry. Co.*, 201 Pa. 237; *Kennedy v. R. R. Co.*, 32 Pa. Super. Ct., 623; *Kuhlen v. Ry. Co.*, 193 Mass. 341, 79 N. E. 815; *Pa. R. R. Co. v. Stockton*, 184 Fed. 422; *So. Pac. R. R. Co. v. Ward*, 208 id. 385. Of course the accident to Mrs. Bright was not in itself evidence of negligence in defendant company, and it is conceivable that even a change of the gate for reaching the train may become necessary and be made consistently with due care on its part. But when, as in this instance, a large number of persons had, by a sign and otherwise, been encouraged to assemble at a given gate and an announcement was made calculated to turn them to another, ought not such step to have been accompanied with precautions against a stampede? The number of persons bound for Reading was, it seems, great enough to call for an entire train. Yet the gathering at the Reading gate was so small as possibly to indicate that the far greater assemblage at the other gate must be largely made up of those who were looking for the Reading train and might rush for it when announced ready at another gate. All the cases are to the effect that the question of due care or negligence depends upon the adequacy or inadequacy of the arrange-

ments made for meeting the exigencies to be anticipated under the circumstances, and that question was clearly present in this case. The defendant's second and fifth points, to the contrary, could not therefore have been properly affirmed. The decisions relied on in support of them by defendant are not apposite. They deal with extraordinary occurrences, not reasonably to be expected. Thus in *Ry. Co. v. Hinds*, 53 Pa. 512, a riotous crowd rushed upon the cars at a regular station and commenced to fight within them, injuring the plaintiff,—a thing the company was not obliged to look for and provide against. In *Ellinger v. R. R. Co.*, 153 id. 213, the injury complained of by plaintiff was inflicted by a rude person pushing her off the car as she was about to descend, and it was said that protection of passengers against the bad manners of fellow-passengers was not ordinarily one of the duties imposed by law upon the company, there being no basis for anticipating and no practicable way of guarding against such occurrences. Similar to this case are those of *Graeff v. R. R. Co.*, 161 id. 230, where the plaintiff's injury resulted from the act of a fellow-passenger which was "rude, impatient and unusual,"—*Madden v. R. R. Co.*, 90 N. Y. Supp. 261, where a crowd rushing through a car inflicted an injury upon plaintiff which was "unusual and could not have been apprehended," and where the whole occurrence is characterized as "the unexpected," not to be foreseen and therefore giving rise to no liability,—and *Jackson v. Ry. Co.*, 217 Mass., 515, 105 N. E. 379, where plaintiff was pushed by a crowd into an incoming car and fell over the dress-suit case of a passenger, nobody being able to foresee the extraordinary assemblage of people or their equally extraordinary behavior. In the present case, the plaintiffs' evidence discloses some rough conduct on the part of the crowd. Yet defendant's testimony is that there was nothing unusual about the crowd, "that is, in the crowding or confusion around the gates,"—"nothing different from the average crowd of excursionists,"—nor "any unusual rush." Assuming that the witnesses on both sides told the truth, (and their depositions may stand together) it is fair to infer that, on the basis of past experience of those in control of the station, what happened was reasonably to be expected and should have been foreseen by them. If so, it ought to have been

guarded against by the presence of officers numerous enough and competent effectively to deal with the situation,—all matters for the jury to pass upon.

But, it is insisted, even if there was negligence in the particulars referred to, it was the negligence, not of the defendant company as averred in the declaration, but of the Washington Terminal Co., the owner and operator of the station, whose employees were in control of it, and for whose dereliction, if any there was, the defendant company cannot be held responsible. This is, to be sure, not an action upon a contract of safe carriage, but of tort. Yet it is a familiar doctrine (see Judge Rice's opinion in *Hoehle v. Heating Co.*, 5 Pa. Super. Ct. 21) that a duty assumed under a contract relation and wrongfully neglected may be made the basis of an action for negligence,—and when it is, it is clear that the nature and measure of the duty involved are those which result from the contract. When a railroad company undertakes to carry persons from one place to another and back again it needs no citation of authorities to show that it obligates itself to arrange for their reasonably safe unloading and reloading at the point of destination; and if at that point it chooses to avail itself of a station belonging to another corporation and manned and controlled by the latter's employees, the railroad company cannot but take responsibility for the exercise of due care on their part as, for the time being and between it and its passengers, its own agents. In principle this common-sense proposition is borne out by *Peters v. Rylands*, 20 Pa. 497, (approvingly cited in *Rauch v. Lloyd & Hill*, 31 id. 358, 366,) and *R. R. Co. v. Keighron*, 74 id. 316. In the former, an action on the case, the owners of passenger cars used on the Columbia railroad belonging to the Commonwealth, were held liable for an injury to a passenger by a collision of two of their trains, though the motive power was furnished by the state and under the control of its agents and the accident happened through their negligence. Says the Court, at p. 502,—

“The parties contracted with a view to the law of the road. The defendant knew very well that the road on which he contracted to carry the plaintiff belonged to the state, and was controlled by the Canal Commissioners; that the motive power on which he must depend for the

performance of his contract, was furnished by the state and conducted by her agents, over whom he was to have no control whatever . . . Had his contract with the plaintiff been drawn out into form it would have recited, as it necessarily implies, a previous arrangement with the state authorities for the use of their road, their engines and their agents. As between him and the passenger, these means of transportation become his. Pro hac vice the locomotive and the engineer are his engine and engineer, and logically, as well as on the principles of many adjudged cases, he is responsible for their conduct. If in borrowing these means of transportation he has not stipulated for supreme control in himself, . . . that is his own concern. He holds himself out to the world as furnished with such means of transportation, and invites the confidence of the public in his ability to carry safely. The passenger looks only to him . . . On what principle, then, at all consistent with the actual relations established between the parties, is the passenger to be denied redress for injury resulting from the negligent performance of this contract?"

In the other case, also an action for negligence, a railroad company delivered cars to oil stations to be filled by servants of the oil company, none of the railroad company's servants being there or participating. Through the negligence of the oil company's superintendent a car ran away, collided with an engine, set fire to other cars and burned a neighboring house. It was held that as between the railroad company and third parties the former was liable for the negligence of the superintendent as its agent.

Highly instructive in this connection are two decisions in Massachusetts. A subway station owned by the city of Boston was by it leased to a certain corporation and used by a street railway company under a conceded agreement with the city's lessee retaining to it the control and management of the station. A passenger of the street railway company having been injured in alighting from a car sued that company, averring negligence in the construction of the platform, in the want of warning of its defect, etc. Judgment for the plaintiff was reversed on the grounds of apparent contributory negligence in plaintiff (to whom the alleged defect, if a defect, was

patent, and by whom its danger might readily have been avoided), and the absence of responsibility in defendant for the character of the construction of the platform, its supposed defectiveness and the practicability of warning passengers concerning it being, moreover, virtually negated by the Court: *Hilborn v. St. Ry.*, 191 Mass. 14, 77 N. E. 646. In *Kuhlen v. St. Ry.*, 193 Mass. 341, 79 N. E. 815, on the other hand, where the same street railway company and station appear to have been involved, and the suit was also against the street railway company using the station, the negligence averred was the want of adequate provision for and the lack of due care in the management of a crowd. The plaintiff, a passenger, had entered the station, and with others the platform to take a train and had been crushed in a rush of people attempting to board the same car. For the purpose of proving the conditions of its occupancy of the station, defendant offered in evidence a written agreement between the city's lessee and a company to whose rights defendant had succeeded, showing that defendant's use of the station was subjected to the rules, regulations and directions of the lessee's officials,—i. e., that defendant had no control over the operation of the station, could not have limited the number of persons admitted thereto, etc. The offer was excluded by the trial court, and this was held not to have been error, the appellate court saying, with the citation of authorities from various jurisdictions,—

“The general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for its own benefit and for its own purposes invites another to enter it, may, if the other elements of liability concur, be held responsible, to the latter for an injury caused by the defect or danger.”

There is probably no necessary conflict between these two decisions. If there be any, the later and therefore controlling deliverance manifestly agrees with the doctrine recognized in the Pennsylvania cases above cited and brings it down to a case very closely approximating the present one. Indeed, the application and effect of that doctrine, thus fortified, to the pleadings and facts of this case are so obvious that no further

elucidation seems needful. In accordance with it, the defendant's fourth point could not properly have been affirmed, and whether plaintiffs knew that the station was under the control of the terminal company seems quite immaterial, inasmuch as their dealing was with and their reliance upon the defendant company. Neither, for reasons sufficiently apparent from the foregoing discussion, was this a case for binding instructions in defendant's favor as requested in its sixth point.

What has been said is believed to cover the substance of all the contentions made in this case and to preclude the right of the defendant company, upon any of the grounds advanced in its behalf, to either a new trial or judgment n. o. v., and therefore—

The rules to show cause are discharged.

IN RE TRANSFER OF LICENSE OF COLUMBIA HOTEL COMPANY.

Liquor Laws—Corporations—Act of April 29, 1874, P. L. 73.

Neither the Act of April 29, 1874, nor any of its supplements, authorizes the incorporation of companies to become licensed retail liquor dealers. There is no law authorizing the granting of a retail liquor license to a corporation.

In the Court of Quarter Sessions of Lehigh County. In re Application for Transfer of the Retail Liquor License now held by Mrs. Ella L. Fenstermacher to the Columbia Hotel Company.

Lawrence H. Rupp, of Butz & Rupp, for Petitioner.

Groman, P. J., November 20, 1916. The Columbia Hotel Company of Allentown, Pennsylvania, was incorporated October 29, 1915, "for establishing and maintaining a hotel." The retail liquor license of Ella L. Fenstermacher was transferred to the company on November 15, 1915, and on the same day a rule issued on the Columbia Hotel Company to show cause why the license so transferred to the corporation should not be transferred to some person or persons, the court having grave doubts whether the incorporation act of April 29,

1874, and supplements thereto authorized the incorporation of companies to become liquor dealers either at wholesale or retail.

The attention of the court has not been called to any act authorizing an incorporation for the purpose of selling vinous, spirituous and malt liquors at retail; some light, however, may be thrown on the subject by inquiring into the matter of incorporating for the purpose of carrying on the business of "buying, selling, trading or dealing in vinous, spirituous and malt liquors at wholesale." The Pennsylvania Bottling and Supply Company was incorporated in Pennsylvania on December 28, 1892, under the Act of April 29, 1874, and after the passage of the Act of June 25, 1895, P. L. 295, made application to amend its charter so as to authorize the company to engage in the business of "buying, selling, trading or dealing in vinous, spirituous and malt liquors at wholesale." In an opinion filed by Deputy Attorney General Elkin, later a Justice of the Supreme Court of Pennsylvania, on June 10, 1897, reported in 6 Pa. Dist. Reports, 530, the Attorney General held that the act as amended did not authorize the incorporation of companies for "buying and selling of vinous, spirituous and malt liquors at wholesale." Quoting from the opinion, he used the following language:

"It is a fundamental rule of law that a company cannot be incorporated for the purpose of engaging in any business unless authorized by Act of Assembly. There is no statute in our State which, in express terms, authorizes the incorporation of companies to engage in the business of 'buying, selling, trading or dealing in vinous, spirituous and malt liquors at wholesale.' If such a company can be incorporated, it must be under the provisions of the Act of June 25, 1895, P. L. 295. This act amends paragraph 16 of the second sub-division of the second section of the General Corporation Act of 1874 by providing for the incorporation of companies for 'buying, selling, dealing or trading in any kind or kinds of goods, wares and merchandise at wholesale.' Prior to the approval of this act there was no provision of law for the incorporation of a company to transact a wholesale business in Pennsylvania. The question then arises whether this act is broad and comprehensive enough in

its terms to include the incorporation of a company to deal in vinous, spirituous and malt liquors at wholesale.

"It certainly was not the intention of the legislature to provide for the incorporation of companies to do a wholesale liquor business. The legislature has always dealt with the liquor traffic on a basis different from other kinds of business and trade. The words 'goods, wares and merchandise,' as used in the act of 1895, above referred to, must be construed to have been used in their ordinary and commercial sense. When so construed and understood, they are not broad enough to include the business of selling vinous, spirituous and malt liquors.

"This construction is further strengthened by a knowledge of the fact that frequently, since the approval of the Act of 1874, attempts have been made to amend that act by providing a method for incorporating companies to engage in the business of buying and selling vinous, spirituous and malt liquors. These efforts have always failed of success. It will not therefore be seriously contended that a rule of construction should now be adopted which will permit that to be done by implication which the legislature has refused to authorize by express terms. The words 'buying, selling, trading or dealing,' as used in the Act of 1895, indicate that the purpose of the act was to authorize the transaction of certain kinds of business in the commercial sense. They are not such words as are commonly used in reference to the liquor traffic. It can scarcely be said that a person authorized by license to sell liquor is engaged in the business of 'trading or dealing' in 'goods, wares and merchandise.' "

It is however urged that the provisions of the Act of June 9th, 1901, P. L. 624, a supplement to the Act of April 29, 1874, providing for the incorporation of companies for the transaction of any lawful business not otherwise specifically provided for by act of assembly is wide enough to include a company incorporated to sell liquor at retail. We are not without precedent in this State relative to this proposition: in Brennan's License the court of Allegheny County, after consulting with all the Common Pleas Judges of the county, in an opinion filed September 28, 1905, and reported in 14 Pa. Dist. Reports, 737, reached the conclusion that the pro-

visions of the Act of April 29, 1874, P. L. 73, the amendment of June 25, 1895, P. L. 295, and the amendment of July 9, 1901, P. L. 624, did not authorize the incorporation of companies to become licensed liquor dealers at wholesale or retail. Shafer, J., in the opinion filed in said proceeding, used the following language:

"The only acts which authorize the incorporation of any company to conduct the liquor business in any way that we have been able to find are the Acts of April 10, 1879, P. L. 20, and the Act of June 22, 1883, P. L. 156, which provide for the incorporation of companies for the manufacture of malt and brewed liquors. The Act of June 25, 1895, P. L. 295, provided for the incorporation of associations for various purposes, among them that of 'buying, selling, trading or dealing in any kind or kinds of goods, wares and merchandise by wholesale.' Under this act, applications were made for charters for the purpose of dealing in liquors at wholesale. Mr. Justice Elkin, then Deputy-Attorney General, in a clear and forcible opinion, published in 6 District Reps. 530, advised the Secretary of the Commonwealth that the general words of the act did not cover the case of the sale of liquors, which has always been a subject of special regulation. The Act of July 9, 1901, P. L. 624, under which the charter of the present applicant was granted, is in still more general terms. Adopting the reasoning of the opinion just mentioned, and applying it to the Act of 1901, we are of opinion that it was not intended to authorize the incorporation of companies to become licensed liquor dealers, either at wholesale or at retail. The whole system of the license law is intended to prevent liquor licenses from getting into the hands of persons unfit to conduct the business, and for that purpose requires evidence of the good moral character and temperate habits of the proposed licensee, and requires him to be a citizen of the United States, and the liquor laws make him responsible, criminally, for certain infractions of them, even though not committed by himself personally. Careful provision is made for transfers, in case of necessity, of a license already granted to properly qualified persons. If licenses are to be granted to corporations formed for the purpose of procuring them and acting under them, every one of these requirements of the law

would be made nugatory. We cannot understand how a corporation can have moral character or temperate habits, how it can set out its place of birth as required by the Act of June 9, 1891, P. L. 257, or how a transfer of the whole interest in the license from the persons at one time holders of the stock to other persons, as often as they may deem proper, can be inquired into by the court. The business of such a company might be wholly transferred at any time by a sale of stock from one set of men to another. To show that the incorporators, at the time of the application for the license or transfer, are person of good moral character and temperate habits cannot help the matter, because they may at any time cease to be stockholders. All the expressions and provisions of the license laws, except so far as brewing companies are authorized to be incorporated, seem to apply only to natural persons. We are therefore of opinion that there is no law authorizing the granting of a license to a corporation except brewing companies, as above stated. And we are further of opinion that no corporation is a 'fit person' to receive a liquor license within the meaning of the Act of Assembly."

Now, November 20, 1916, the court having reached the conclusion that the Act of April 29, 1874, and supplements thereto, does not authorize the incorporation of companies to become licensed retail liquor dealers, the Columbia Hotel Company may and is hereby permitted to ask for the transfer of the retail liquor license granted to the company on November 15th, 1915, to some fit person or persons; such application for transfer to be made on or before the first Monday of February, 1917, upon which date this rule will be made absolute.

ESTATE OF JOHN L. WITMER, DECEASED.

Widow's Dower—Interest—Liability for—Two Dowers on same Property—Payment of—Duty of Widow—Rights of Heirs.

The proceeds of a sheriff's sale of real estate on a writ for the collection of a dower, where there was accrued interest due to the widow and also a subsequent dower charged on the same property, should be awarded to the heirs, entitled thereto, in payment of the principal of the first dower and the balance to the second dower, but no interest can be paid from such fund.

The second dower was divested by such sale.

A purchaser is personally liable for payment of interest due on a widow's dower remaining charged upon the land and it is the duty of the widow to collect the same from him or even from an intruder in possession of the property and the interest of the heirs in remainder can not be diminished because of a neglect of such duty.

Exceptions to adjudication. Orphans' Court of Lancaster County, February Term, 1916, No. 11.

H. Edgar Sherts and B. Frank Kready, for exceptions.

M. E. Musser, Contra.

December 14, 1916. Opinion by Smith, P. J. Real estate of which John S. Witmer died seized was charged with a statutory dower of \$630.00 for the use of his widow, Catharine Witmer. Later the same real estate was again charged with an additional dower of \$1447.50 for the use of Mary A. Herr, the widow of Henry C. Herr. The amount of each of these dowers was made payable after the death of each widow to persons legally entitled to it.

The purchaser of this real estate discontinued the payment of interest on both dowers and abandoned the property. One E. O. Sneath without authority went into possession of it. He was an intruder. He attorned so far as to pay Catharine Witmer the interest on her dower to April preceding her death, December 24, 1915, and also paid the taxes. The property was sold for \$1905.00 by the sheriff on a writ issued out of this Court for the collection of the first dower. After the payment of costs and charges there will be left \$1557.28, which the Court has been asked to order the sheriff to pay to those entitled to it. Interest from April 1, 1915, to September 18, 1916, is claimed in behalf of those who ordinarily would be entitled to it by reason of the Witmer dower; and all that then remains is demanded by the executor of the will of Mary A. Herr on account of interest accrued on her dower; regardless of the rights of those in remainder in whom the charge vested at the time of its creation.

The case now comes up on exceptions to the decree of distribution. The refusal of interest on the dowers is assigned as error. Interest was not denied the claimants because it was not due, but because there is no fund out of which it can be paid.

It is unnecessary to distinguish the forms of ascertaining and assigning dowers, or whether dedicated by the Orphans' Court, the Common Pleas or by the agreement of the parties, as their attributes are substantially the same. *Baker v. Leibert*, 125 Pa. 106. The partition act of March 29, 1832, P. L. 201, has not changed the character of the dower (*Kunselman v. Stine*, 192 Pa. 462). Therefore, the adapted principles will be applied to dowers generally.

The attempts to define the nature of a dower have not been uniform. Sometimes it is declared a lien, at others an estate. If it is not technically a lien, undoubtedly at times it has the features of one. It at least generates a lien or something which has been so classed, for while a sheriff's sale to satisfy a later encumbrance does not discharge the dower, it does discharge the interest which has accrued on it, except when a mortgage intervenes. *Dickinson v. Beyer*, 87 Pa. 274. Section 1 of the Act of April 8, 1833, P. L. 316, declares a dower to be a part of a deceased intestate husband's real estate for the term of his widow's life. In *Bachman v. Crisman*, 23 Pa. 162, Lowrie, J., said: "The widow's interest in the real estate of her deceased husband in our state does not come within the ordinary definition of dower, because that refers to the common-law provision for widows. But it is a statutory substitute for that provision, and may be very well called statutory dower. Like dower at common law, it is a defined interest in her late husband's lands, arising at this death, and is a freehold estate." In a concurring opinion in *Ziegler's Appeal*, 35 Pa. 173, Woodward, J., said: "The ground on which I concur in the above decree is that the widow's dower was not a lien within the meaning of the Act of 1830. . . . In *Shaupe v. Shaupe*, 12 S. & R. 12, the widow's interest in her husband's land, . . . is defined to be an interest arising out of lands in all respects of the nature of a rent-charge. Accordingly, it was held in *Turner v. Hauser*, 1 Watts 420, that her remedies were those of a landlord against a tenant. 'Without the benefit of this construction, said Judge Rogers, 'the widow would only be entitled to payment as a lien or judgment-creditor.' " In *Diefenderfer v. Eshleman*, 113 Pa. 305, it was said that, "A tenant in dower at common law has an estate and not

a mere lien So under our intestate laws a widow's statutory dower is an interest in the land, not merely a lien." Mr. Justice Williams, in *Kunselman v. Stine*, 183 Pa. 1, said, "Dower consummate is a life estate."

A purchaser is personally liable for the payment of the interest on the widow's dower. *Kunselman v. Stine*, 192 Pa. 462. In *Hershey v. Delone*, 51 Sup. Ct. 265, the Superior Court held that a judgment obtained by a widow for arrearages of interest on a dower charge can not be entered *de terris*.

A dower in Pennsylvania may briefly be defined to be a life estate, and it follows that such had each of these widows. The estate in each case was the life estate and what we will call the remainder, an interest which vested with the creation of the life estate to be enjoyed after its termination. Notwithstanding these vested interests coordinated the life estates, it is contended that they must fall that the arrearages of interest may be had for the estates of the deceased widows, notwithstanding the cause of the arrearages can be traced to the negligence of those interested in the dowers. Suppose the land was deserted, worked by no one, and yielded nothing, could the supine indifference of the widows be excused and their estates reimbursed at the cost of those having the vested interest in remainder? What would there have been to prevent the life tenants from cultivating the land, and thereby reaping to the amount of their dues? Can a life tenant be held blameless who permits the property to waste and decay? Have remaindermen no rights because life tenants happen to be dowered widows? Recovery should be denied the estates of such, and if in no other way by applying the doctrine of estoppel because of negligence. If a life interest yields nothing there is nothing for the life tenant. But these widows were not driven to such a straightened position. They had an ample remedy: the purchaser of the land, though he abandoned it, was "personally responsible," and there is nothing to show that in this case he was not abundantly able to pay. There was "privity of contract," and an action against him would have been transitory. He could have been followed had he left the jurisdiction, which does not appear he has done. *Kunselman v. Stine*, 192 Pa. 462. There is another aspect of this case which was

elaborated in *Seaton v. Jamison*, 7 Watts 533, by Kennedy, J. It was an action of dower. Damages, "including the annual value or profits of the land during the occupancy of former tenants long since dead," were assessed and judgment entered against persons "not tenants of the fee, nor having any interest." It was held that an action "may be maintained against a person having the freehold, either by right or wrong such as a disseissor, abator, intruder, etc." The answer that the defendants "were not tenants of the fee, and have no interest" was immaterial. To this it was said, "if this latter expression was intended to mean no right, as I am inclined to think it was, the defendants, perhaps, notwithstanding, might be intruders, . . . and if so, the demandant would be entitled to have her writ against them." From this view what was there to prevent these widows from having "their writ" against E. O. Sneath, who was an intruder.

In *Hise v. Geiger*, 7 W. & S. 273, it was held that where one-third of the purchase money of real estate was charged thereon, "the interest thereof to be paid to the widow . . . annually during her natural life, and after her death the principal to be paid to the legal heirs," and "the purchaser gave bonds and a mortgage on the land to the administrator to secure the purchase money;" the condition of one of which was "for the payment of the interest on one-third of the money to the widow, and the principal at her death to the said administrator for the use of the heirs," and after the death of the widow "the whole amount of the principal sum which was payable at her death was paid," that an heir may bring an action and recover. The Court through Rogers, J., said "in language which can not well be misunderstood, the court decreed that the principal, after the death of the widow, shall be paid to the legal heirs of the intestate, in equal proportions. To enforce this decree, this action is brought. By the decree, a lien is created on the land, whether it be in the hands of the purchaser or his assignee, in favor of the heirs of the deceased. Of the benefit of this lien, they can not be deprived." Otherwise the heirs would be denied "the lien which it was the intention of the law and the decree of the court to give them." This case is applicable in that the Court

adopted the lien theory of the dower and emphasized the rights of those entitled after the death of the widow to the amount charged—the heirs, or remainderman as we have chosen to call them. The equities in favor of the purchaser were weighty. No doubt the heirs were fully informed as to the bonds and mortgage and the arrangement met with their approval, yet the Court relentlessly guarded the rights of the heir.

There remains a question which by no means is free from uncertainty. The action which led to the sheriff's sale is in this Court and its regularity has not been attacked; but the question which no authority found has answered is, How was the second dower affected by the sale? These dower estates were not admeasured, as was done under the common law, and as is done in some states, but if the history of the dower and analogy are to have weight, did the sale by the sheriff to recover on the first dower divest the second one; if it did not, it would seem as if the proceeds of the sheriff's sale after satisfying the Witmer dower would belong to the owner of the fee, whose land was sold. As an elaboration of this thought by a lower court would be of little consequence, we will simply decide that the second dower was divested, on the theory of the policy of the law, the doctrine of expediency, and the adaptability of the mutable dower.

The exceptions are dismissed, and the adjudication is confirmed.

CITY OF M'KEESPORT v. M'KEESPORT AND
REYNOLDTON P. R. CO. ET AL.

Municipalities—Franchises—Street Railway Contract.

An ordinance between the city and the company was a contract, and the consideration was the license fee. The reasonableness of the penalty can be raised at the trial.

In the Court of Common Pleas of Allegheny County,
No. 315, Fourth Term, 1911.

Howard W. Douglass, for Plaintiff.

Reed, Smith, Shaw & Beal, for Defendants.

Opinion by Ford, J., April 22, 1916. At No. 315 Fourth Term, 1911, of the Court of Common Pleas No. 4, the City of McKeesport entered an action against the McKeesport and Reynoldton Passenger Railway Company to recover certain amounts alleged to be due the City of McKeesport by virtue and under authority of an ordinance duly approved October 11, 1905.

The particular portions of the ordinance, out of which the questions involved in the action arose, are as follows:

"Section 1. . . . That the McKeesport Passenger Railway Company shall hereafter pay for license to the City of McKeesport, successor to the Borough of McKeesport, for city purposes for the franchises granted by said ordinance, the sum of Eight Thousand Dollars (\$8,000) per annum.

"Section 2, provides that notice is to be given the McKeesport superintendent of the defendant company.

"Section 3. That such licenses levied as aforesaid shall be due and payable to the City Treasurer on the first day of July in each year. If not paid by the first day of August, ten per centum shall be added. All remaining unpaid August first shall be certified by the City Treasurer to the City Solicitor, who shall proceed to collect the same by action of assumpsit or otherwise, as shall be provided by law. . . ."

The statement alleges that the defendant companies "are legally and justly indebted to the plaintiff in the sum of Forty-four Thousand Dollars (\$44,000.00) with interest on the various sums that make up said amount as follows: \$8,000.00 being license tax for 1907, together with \$800.00, being 10 per cent. penalty thereon, and interest on \$8,800.00 from August 1st, 1907; \$8,000.00 being license tax for 1908, together with \$800.00 being 10 per cent. penalty thereon and interest on \$8,800.00, from August 1, 1908; \$8,000.00 being license tax for 1909, together with \$800.00, being 10 per cent. penalty thereon and interest on \$8,800.00 from August 1, 1909; \$8,000.00 being license tax for 1910, together with \$800.00, being 10 per cent. penalty thereon and interest on \$8,800.00 from August 1st, 1910; and \$8000.00 being license tax for 1911, together with \$800.00, being 10 per cent. penalty thereon and interest on \$8,800 from August 1st, 1911, . . ."

The defendant filed an affidavit of defense averring, among other things, that the tax or license fee imposed by virtue of said ordinance is unreasonable, unjust and unconstitutional.

The case came on for trial, and was so proceeded in that on December 9, 1913, under instructions of the trial judge a verdict was rendered in favor of the plaintiff in the sum of \$55,462.00. The amount of the verdict was calculated in accordance with the claim in the statement, and included not only the principal sum of \$8,000.00, being license fees assessed for each of the years, with interest from the different dates as indicated, but also a penalty of \$800.00, being ten per centum of the license fees assessed for each year. The interest was calculated upon the license tax and also upon the ten per centum added thereto. The interest upon the penalties aggregated \$340.00.

After argument upon motion for a new trial and for judgment non obstante veredicto, both motions were refused, an appeal was taken to the Supreme Court and, on January 3, 1916, the judgment was affirmed.

On March 7, 1916, the defendants, the Pittsburgh Railway Company, presented its petition averring that at no time during the trial or upon the appeal of this case was the question raised or discussed as to the right of the City of McKeesport to recover interest upon the principal sum and also to recover the amount of the penalty with interest upon the penalty; and praying that the said judgment be opened and corrected by deducting the amount of the penalties with the interest thereon, or, if the penalties are held to be legal, to deduct the interest upon the principal sum and upon the penalties, and that the judgment so entered shall also be amended in accordance with the prayer of its petition.

The contention of the plaintiff is, that insofar as the judgment is concerned the verdict of the jury in the lower court, as affirmed by the Supreme Court, is absolutely conclusive and binding upon the defendants.

The questions for consideration are:

(a) The right of a Court of Common Pleas to amend or modify its judgment after an affirmance by the Supreme Court.

(b) The right of the city to recover both interest and penalties.

Where the court would otherwise have authority to amend a judgment, it may be done even after appeal taken, if there be anything on the record to justify the amendment. At the expiration of the term at which it was entered, the common law power to set aside a judgment, regular on its face, ends. *King v. Brooks*, 72 Pa., 363. The further control over it is equitable and was asserted originally by bill in chancery. *Fisher v. Railway Co.*, 185 Pa., 365. After an adjudication on appeal, the Court of Common Pleas has no right to amend or modify the judgment except as to matters not considered either in the entry of judgment or on appeal. In *Commonwealth v. Tayler*, Chest., 261, it was held that the affirmation of a judgment for want of a sufficient affidavit of defense does not take away the power of the Court of Common Pleas to open the judgment and let the defendant into a defense. In *West Chester & Wilmington Plank Road Company v. Chester County*, 21 Pa. C. C., 86, an application to strike off an allowance of interest made after a judgment has been affirmed on appeal, it was said, "The Supreme Court passed upon no question of the allowance of interest upon the judgment." By their confirmation they simply said that the errors complained of by plaintiff did not exist and the verdict must stand. The Court ordered that the record be amended by striking out from the entry of judgment the words following, to wit, "with interest from May 15, 1895."

The equitable power of the court to correct errors manifest in the record does not however empower the court to correct a judgment on the ground that it is erroneous in law, or on the ground that the trial court committed error.

"A judgment of the proper court, being a sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same subject matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and it is not only binding upon them, but upon the courts and juries, ever afterwards, as long as it shall remain in force and unreversed." *Bell v. Allegheny County*, 184 Pa. 296. *Lancaster v. Frescolmi*, 203 Pa., 640.

A judgment settles everything involved in the right, not only matters that were raised, but those which might have been raised. *City of Corry v. The Corry Chair Co.*, 18 Sup. 271.

In the case at bar, the statement fully informed the defendant of the specific items of plaintiff's demand. The modification now asked is the striking out of the amounts claimed for penalties or as interest. To plaintiff's claim for penalties and interest defendant did not specifically answer.

The defense that the tax or license imposed is unreasonable, unjust and unconstitutional, necessarily involving consideration of the terms, conditions and requirements contained in the ordinance then before the court for construction.

Judge Frazier, in his opinion overruling the motion for judgment non obstante veredicto, said:

"The amount sued for is the consideration charged by the municipality for granting its consent to the railway company to occupy and use its streets, in accordance with its contract with the company. The fact that the ordinance called the consideration a license tax does not change its character. The charge still remains the price to be paid for the privilege of using the streets of the plaintiff city."

It may be conceded that the city has no power to provide for forfeitures or penalties, except as authorized by the Legislature. Here, however, the penalty is provided in the contract as "a part of the price to be paid by the defendant." The city fixed an annual sum which, if paid on or before August 1, was in discharge of defendant's obligation, but if not paid prior to date, the contract provided that an additional sum was to be paid by the defendant company. Whether the sum mentioned in the ordinance or contract as an amount to be added for non-payment was fixed and agreed as liquidated damages, or was reasonable, and whether the city had a right to impose a penalty and collect interest are questions which, under the pleadings, could have been raised and determined.

The defendant elected to submit the case without offering evidence tending to show that the penalty was unreasonable, nor does it appear that the defendant was

prevented from raising the questions now urged. The defendant has had its day in court, the case was fully heard and determined against the defendant, both in the Court of Common Pleas and in the Supreme Court, and we are of opinion that the rule should be discharged.

FREDERICK v. METROPOLITAN LIFE INSURANCE COMPANY.

Bankruptcy—Insurance Policy—Beneficiary—Trustee—Surrender Value.

In a bankruptcy proceedings, a life insurance policy payable to the wife of the bankrupt, not being subject to levy or process by creditors of the insured, on the latter's death, the proceeds of the policy go to the wife, and the trustee in bankruptcy is not entitled to anything; even when the policy had a paid-up or surrender cash value at the time the insured was adjudged a bankrupt.

There is no contractual relation between the insurance company and the creditors of the insured, and the company is only liable under the terms of the policy so that payment having been made, at the death of the insured, to the beneficiary in accordance with the terms of the policy, recovery by a trustee in bankruptcy for the benefit of creditors will be denied.

In the United States District Court, W. D. of Pa.
Bankruptcy. No. 1, November Term, 1915.

Alpern & Seder and Lowrie C. Barton, for Plaintiff.
Jennings & Jennings, for Defendant.

July 12, 1916. The Court: This action is brought by a trustee in bankruptcy to recover the amount of a policy of insurance on the life of a bankrupt. By stipulation filed, the parties waived a trial by jury, submitting the case to the adjudication of the court.

FINDINGS OF FACT.

First. An involuntary petition in bankruptcy was filed on December 19, 1912, against John E. Schmidt, and on January 8, 1913, he was duly adjudged a bankrupt, and Elliott Frederick, the plaintiff herein, was elected trustee of the estate and duly qualified and acted as such trustee.

Second. At the date of the filing of the petition and adjudication, the bankrupt was the owner of a certain

policy of life insurance in the Metropolitan Life Insurance Company, issued on July 10, 1909, in the sum of five thousand dollars, being an ordinary life policy, payable on the death of the insured to Anna M. Schmidt, wife of the insured, beneficiary, with the right of revocation.

Third. On April 4, 1913, John E. Schmidt died leaving his said wife surviving, and due proof of his death was made and delivered to the defendant company and by it accepted.

Fourth. At the time of the filing of the petition and adjudication, the said policy had a cash surrender value of \$524.04, but the same was not included in the schedules of the bankrupt.

Fifth. The said policy contained the following provision:

"Change of Beneficiary: When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, if there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary with or without reserving right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the policy by the company. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured."

The right of revocation was duly reserved by the terms of the policy.

Sixth. The insured did not exercise or attempt to exercise during his lifetime, either before or after the adjudication in bankruptcy, the right of revocation by designating a new beneficiary, in the manner provided by the policy or otherwise, and on April 22, 1913, the defendant company paid to Anna M. Schmidt, the beneficiary named in the policy, the amount of the policy in full.

Seventh. The petition in bankruptcy was filed on December 12, 1912, the adjudication was had on January 8, 1913, and the bankrupt died on April 4, 1913.

This is an ordinary life policy, taken out by the insured at the age of fifty-four. The policy provides that the company—

"In consideration of the annual premium of \$212.41, and with the payment of a like amount on each tenth day of July hereafter, until the death of the insured, promises to pay at the home office of the company in the City of New York, upon receipt at said home office of due proof of the death of John E. Schmidt, of Rochester, County of Beaver, State of Pennsylvania, herein called the insured, five thousand dollars, less any indebtedness hereon to the company and any unpaid portion of premium for the then current policy year upon the surrender of this policy properly receipted to Annie M. Schmidt, wife of the insured, beneficiary, with right of revocation."

It will be noted that thus far there is no condition by which the policy is payable in any case to the insured, to his estate, or to his executors, administrators or assigns, the payment being unconditionally to the wife, with the right of revocation. Then followed the clause above quoted, authorizing a change of beneficiary. The method of effecting this change is therein pointed out, namely, "by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the policy by the company." Then follows the provision: "If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured." There is a later clause that, "No assignment of this policy shall be binding upon the company unless it be filed with the company at its home office."

Looking, then, at the policy with its conditions, these propositions may be stated:

First. The interest of the wife in the policy, during the life of the insured, is not a permanent or vested interest, but inchoate and expectant. *Hopkinson v. Washington Life Assurance Co.*, 99 Fed., 199.

Second. This interest or expectancy of the wife can be defeated only by her death before the insured, or by the latter exercising his right to change the beneficiary. If neither of these conditions occur, on the death of the insured the wife's interest becomes vested and absolute.

Third. The conditions under which a change in

beneficiary must be effected are for the protection of the insurer, and must be strictly followed unless waived by the company.

Stephenson v. Stephenson, 64 Iowa, 534.

Appeal of Bollman, 92 Pa., 50.

In this case there is no pretense that any change of beneficiary was made or attempted. On the death of the insured, and proper proofs of death made, the company paid the policy in good faith to the party designated in its contract as sole beneficiary therein without notice of any character as to any adverse claim thereto. And now after payment, the trustee in bankruptcy of the insured brings this action to compel the company to pay the policy again. There never was any contract relation between the insurance company and the creditors of the insured. Its contract was to pay the wife five thousand dollars on the death of the insured. Two conditions were attached to the contract; that the insured might change the beneficiary in the manner prescribed, and if the beneficiary died before the insured, the interest of the beneficiary should vest in the insured. Neither of these conditions happened, and, therefore, under the terms of the policy the defendant company never became indebted to the insured, to his estate, to his personal representatives, or to his creditors..

But notwithstanding this, it is claimed that there was a surrender value to the policy, that this surrender value at least was an asset of the bankrupt's estate which passed to his trustee under Section 70a of the Bankrupt Act; that the company had presumptive notice of the bankruptcy of Schmidt, and that under the provisions of said section of the Bankruptcy Act, inasmuch as the bankrupt did not elect to pay or secure to the trustee the cash surrender value of the policy within thirty days after the same was ascertained, the trustee is entitled to the whole amount of the policy. If this be true, it is certainly a novel legal situation. There has apparently been much conflict of authority in the Federal courts as to the rights of creditors and other claimants to the proceeds of life insurance policies where the insured became bankrupt, arising under Sections 6 and 70a of the Act of Congress. I will not stop to consider these cases in particular. The conflict is often more apparent than

real. This is due to the differing terms of the policies, the widely different facts of the several cases, the difference in the provisions of the Acts of Assembly of the several states where the cases have arisen, relating to exemptions, and the fact that many of the decisions were rendered before any authoritative deliverence of the Supreme Court on the subject. But the case of *Holden v. Stratton*, 198 U. S., 202, furnishes a rock on which we can stand. That decision has settled definitely and finally these propositions:

(a) That Section 6 of the Bankruptcy Act, which provides as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof, immediately preceding the filing of the petition."

is couched in unlimited terms and is accompanied with no qualification whatever.

(b) That it has always been the policy of Congress, both in general legislation and in bankrupt cases, to recognize and give effect to state exemption laws, and that Section 6 adopts, for the purposes of bankruptcy proceedings, the exemptions allowed by the laws of the several states.

(c) That Section 70a and the proviso found therein relating to insurance policies, imposes no limitation whatever upon the terms of Section 6. That this section does not deal with exemptions, but solely with the nature and character of the property the title to which passes to the trustee in bankruptcy, and that all exempt property is excluded from its provisions.

This decision set at rest much of the conflict which theretofore existed in the courts with reference to these sections. For instance, *Steele v. Buel*, 104 Fed., 968, held that the proviso to Section 70a does not qualify the exemptions accorded by Section 6, while the Circuit Court of Appeals for the Ninth Circuit, in *re Scheld*, 104 Fed., 870, took the opposite position. These are an illustration of the conflicting views taken by the courts.. *Holden v. Stratton* has cleared the case of fractions. Section 6, recognizing and intending to give effect to the exemption

laws of the state, and Section 70a, having no application to exempt property, we have only one question remaining. Is the policy in question exempt under the laws of Pennsylvania? If so, that is the end of the plaintiff's case. There are two Acts in Pennsylvania relating to this subject: The Act of April 15, 1868, P. L. 103, is as follows:

"All policies of life insurance or annuities upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of or bona fide assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such other person."

The Act of May 1, 1876, P. L. 53, provides:

"A policy of insurance issued by any company incorporated under this act on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to their benefit."

Looking at the act of 1868, is there anything in this case, is there a single fact, which should compel the court to hold that this policy was not taken out for the benefit of the wife? If it was taken out for her benefit, there is not foundation for plaintiff's claim. The best evidence that it was so taken out by the decedent, is the fact that she was made the sole beneficiary in the policy, and that he died without defeating or attempting to defeat his wife's interest in the policy. But it is assumed that the whole case is changed by the reservation of the right of the assured to change the beneficiary. This clause has the legal effect of changing the interest of the beneficiary from a vested, to an inchoate or expectant interest. But I cannot see why from the fact the court should find the policy was not taken out for the benefit of the wife. An insurer knows that time may bring a very material change in conditions. The marital relation itself is un-

fortunately subject to many vicissitudes, such as death, divorce or separation. In the lapse of a few years the dependent may become independent, and those now strong may demand our aid and assistance.. To reserve the right to change one's mind if circumstances demand it, is in harmony with the whole course of human action. It is only the part of wisdom to take into consideration the ever-changing conditions of men. Persons frequently revoke their wills, add codicils, and change devisees to meet conditions as they arise; and it is only natural that a husband who takes out a life policy for the benefit of his wife, should reserve to himself the power to change the beneficiary if unexpected conditions should arise which make it necessary or advisable. We should remember that exemptions in favor of the wife, children or other dependents are favorites of the law. The Supreme Court in *Holden v. Stratton* quotes approvingly from the opinions of Circuit Judge Caldwell, as follows:

"From the organization of the Federal Courts under the Judiciary Act of 1879, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt him by the law of the state." (Citing *Lamaster v. Keeler*, 123 U. S., 376, and other cases.)

"The same rule has obtained under the Bankrupt Acts, which have sometimes increased exemptions, notably so under the Act of 1867, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of another construction."

In support of the proposition that the right to change the beneficiary passes the property in the policy to the trustee, counsel have cited numerous cases. In *re Herr*, 182 Fed., 716, the policy was payable to the bankrupt, and only contingently to the wife. In *re Dolan*, 182 Fed., 949, the policy was a twenty-year endowment, payable to the insured or in the event of her death during the endowment period, to her executors, administrators or assigns. It was held by the District Court that the policy was property which could have been transferred prior to the

filing of a petition under Section 70a, and, therefore, passed to the trustee. The Pennsylvania Exemption Acts do not appear to have been involved in the decision and were not referred to. In *Jamison Brothers Company*, 222 Fed., 92, Judge Dickinson, while laying down certain principles for the guidance of the referee, did not undertake to pass upon the effect of the Pennsylvania Statutes of Exemption on the case before him.

The Supreme Court of Pennsylvania has recognized and enforced the Act of 1868 in numerous cases, where there was a conflict between the beneficiary and creditors of the insured. *Anderson's Estate*, 85, Pa., 202; *McCutcheon's Appeal*, 99 Pa., 133; *Schad's Appeal*, 88 Pa., 111, and *Sebring v. Brickley*, 7th Superior Court, 198.

As this was a life policy, payable under its terms only in the event of death, there was no property in the insured which could have been levied upon or sold under judicial process. The insured could not have willed the proceeds to another, as at the instant of his death it would have passed to the beneficiary.

Bollman's Appeal, 92 Pa., 50.

The plaintiff in view of *Holden v. Stratton*, must base his right to recover on the assumption that the policy is not exempt. In other words, that it was not taken out for the benefit of the wife. And then proceeding on that assumption, he claims under the proviso to Section 70a that the trustee was first entitled to the cash surrender value and afterwards, by reason of the failure of the assured to pay or secure this amount to the whole amount of the policy.

Turning to the proviso, we find:

"That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

I fail to find in the policy any provision for a cash

surrender value payable to the insured, his estate, or personal representatives, but if the policy can be so construed, how can the policy itself, which is payable to the wife, ever become assets of her husband's estate, and pass to his trustee, unless the beneficiary is changed, and no one has power to change the beneficiary except the insured himself. Under the decisions in *Burlingham v. Crouse*, *Everett v. Judson*, and *Partridge v. Andrews*, 228 U. S., pps. 459, 474 and 479, respectively, the interest of the estate could not possibly extend beyond the surrender value of the policy. But as I view the policy, it was taken out for the benefit of the wife, is therefore exempt under the Pennsylvania statute, was an inchoate or expectant interest, which existed during the life of the insured, and ripened at his death into an absolute vested interest, entitling her to the whole of the policy. The conclusion herein reached is in harmony with the opinion of the Circuit Court of Appeals of the Second Circuit, in *Burlingham v. Crouse*, 181 Fed., 479, and in *re Hammel & Company*, 221 Fed., 56. Also in *re Boos*, 154 Fed., 494.

Judgment is, therefore, entered in favor of the defendant.

Opinion by Thompson, J.

HENRY v. ZECH.

Death Benefits—Beneficiary—Will.

Testator died a member of a beneficial association, whose by-laws provided for the payment of death benefits to the widow, unless another beneficiary had been formally designated by the member, giving him power by written instrument to change such designation at any time, such instrument to be filed with the president of the association. Testator's will bequeathed to his widow such part of his estate as is given to "surviving widows" by the intestate laws and the residue to his sister. On a case stated between his executrix and the widow as to who should receive the death benefits, Held, that judgment must be entered for the defendant widow.

A member of a beneficiary society cannot make a testamentary disposition of a fund to be derived from his beneficiary certificate.

In the Court of Common Pleas of York County. No. 24, January Term, 1917. Case stated for the opinion of the Court.

Harvey A. Gross for Plaintiff.

W. W. Van Baman for Defendant.

January 1, 1917. Ross, J. From all the facts agreed upon in this "case stated," it is sufficient for the purposes of illustrating our ruling to give the following synopsis:

Alice Henry, the plaintiff, is the widow of Jacob L. Henry, deceased, the executrix of whose will is the defendant.

The said Jacob L. Henry died on the 6th of June, 1916.

Before his death he executed a will which provides as follows:

"First, after the payment of my just debts, I give and bequeath unto my wife that part of my estate of which I die possessed which the intestate laws of the State provide, for surviving widows, and all the rest residue, and remainder of my estate, real, personal, or whatever nature soever, I devise, give, and bequeath unto my sister, Mary Ann, wife of George B. Zech, and I do name, constitute and appoint my said sister, Mary Ann Zech, as the executrix of this my last will and testament."

The will was duly probated and recorded in the office of the Register of Wills of York County, Pa., and letters testamentary were granted to the said Mary Ann Zech.

The decedent left no children to survive him.

At the time of his death and for a number of years prior thereto the said decedent was a member, in good standing, of the "Cigar Makers Local Union No. 242, York, Pa."

That local union was governed, operated and controlled by the constitution of the Cigar Makers International Union of America, and with reference to the payment of death benefits it is provided in said constitution as follows:

"Sec. 143. Upon the death of a member who shall have been such for less than two consecutive years next before his death, no death, funeral or cremation benefit shall be paid. Upon the death of a member who shall have been such continuously for two years or longer period next preceeding his death, the sum of fifty dollars shall be paid toward defraying his funeral or cremation expenses. Said sum of fifty dollars shall be paid to such person or persons as shall have paid or become liable for such funeral or cremation expenses, and if such expenses

have not been paid it shall be the duty of the officer paying such benefit to see that it is applied to the purpose for which it is intended.

"Sec. 144. Including the fifty dollars funeral or cremation expenses, there shall be paid upon the death of a member the following sums, viz: If the decedent shall have been such member continuously for five years or longer period less than ten years next preceding his death, the sum of two hundred dollars. If the decedent shall have been such member continuously for ten years or longer period less than fifteen years next preceding his death, the sum of three hundred and fifty dollars. If the decedent shall have been such member continuously for fifteen years or longer period next preceding his death, the sum of five hundred and fifty dollars."

"Sec. 144c. A member may at any time designate the person or persons to whom his death benefit shall be paid. Such designation shall be in writing, signed by such member and witnessed by the secretary of the local Union to which such member then belongs or by two other credible persons, and such member may at any time thereafter in like manner change such designation. If there be no such designation, or if the paper making such designation be not deposited with the President of the International Union within thirty days after the death of such member, such benefits shall be paid to the widow of such deceased member; if there be no widow, then to the minor children of such deceased member, and if there be no widow and no minor children of such deceased member, then to any relatives of the deceased member who at the time of his death were dependent for support in whole or in part upon such deceased member. If there be no written designation produced and deposited, as above required, no widow, no minor children, nor such dependent relative of such deceased member, or if no application in writing as hereinafter provided for the payment of such death benefit shall be made within one year next after the death of such member, then all right and claim of any and every person to such death benefit shall wholly cease and determine. Such application shall state the name and date of the death of the deceased member, a statement of the facts on which such claim is based shall be verified

by the oath or affirmation of the applicant and shall be accompanied by the official report of such death or certified copy of such report. In case the designation of the beneficiary of any such death benefit is made by a will the original of which is required by law to be filed in court, a certified or sworn copy of such will in lieu of the original may be deposited. Want of knowledge of the death of a deceased member, or of his membership, or of the liability of the union to pay such death benefit, or of any other fact, thing or happening shall not operate to extend the time for the doing or performing of any act or thing herein required to be done or performed by any beneficiary or claimant of any interest in or to any such death benefit."

Upon the death of the said Jacob L. Henry, under the provisions of the above quoted sections of the constitution controlling the said "Local Union" the sum of five hundred forty eight dollars and fifty cents became due and payable to the person legally entitled to receive it, and because it was claimed by both the defendant as executrix of the will, and the plaintiff as the widow of the decedent, the local union gave it into the custody of the attorney for the widow and the attorney for the executrix, and it was deposited by those attorneys in their joint names, and is now so held by them awaiting a legal determination as to whom it should be paid.

So far as it can be ascertained the decedent never designated in writing, or otherwise, any special beneficiary.

No certified or sworn copy of the last will and testament of the said decedent was deposited with the Cigar Makers International Union of America within thirty days after his death as was required by the laws of the organization.

The Court is asked to enter judgment in favor of Alice Henry, the plaintiff, if we are of the opinion that she is entitled to the said money now held as aforesaid, but if the Court is not of such opinion then judgment shall be entered for the defendant.

It has not been made clear to the Court, either by any of the facts submitted, or by information developed by the argument, upon what legal basis the defendant rests any claim to the money in controversy.

It is plain that the testator had been a member of a society which promised by its by-laws, or the prevailing constitutional law of "the Cigar Makers International Union of America," that upon his death it would pay to such persons as were designated in the said law certain sums of money. The death of the member ripened that promise into an obligation which the society recognized by paying; but in order that it might be relieved of the legal responsibility of paying the money to one of two contending claimants, it properly and cautiously delivered it into the custody of the attorneys who represented the contending parties, with the understanding that it should be paid to the person legally entitled thereto, after a legal adjudication. It is to be presumed that the decedent knew the by-laws, or controlling law regarding the payment of the benefits which were to become due at his death and to whom they were to be paid, as related in "Sec. 144" and "Sec. 144c," which last section provides that, "A member may at any time designate the person or persons to whom said death benefit shall be paid." *** "if there be no designation" * * * "such benefits shall be paid to the widow of such deceased member; if there be no widow and no minor children of such deceased member, then to any relatives of the deceased member who at the time of his death were dependent for support in whole or in part upon such deceased member."

It will be observed that the facts in this case reveal the survival of a widow, who is the plaintiff. They also expressly show that no minor children survive the decedent. They also show that no other person was ever designated, as a beneficiary of the deceased member, by him in any way or manner provided by the controlling laws. There is nothing in the language of the will which could be construed to mean that the decedent intended to change the benefits to be paid at his death from the person named in the by-law to any other person. It has been decided that a member of a beneficial society cannot make a testamentary disposition of a fund to be derived from his beneficiary certificate; *Vallman's Appeal*, 92 Pa. 50; *Hunter v. Firemen's Relief and Beneficial Association*, 20 Pa. Sup. 605; *Grant v. Faires*, 253 Pa. 239.

"Immediately on the member's death the original beneficiaries rights became vested:" (29 Cyc. 136e, note

76), and the facts of this case conclusively show that nothing was done by the deceased member in his lifetime that would change, or even indicate his desire to change the payment of the death benefits from the person designated in the by-laws, his widow, to any other person.

From our study of the facts as viewed through well settled principles of law, we are of the opinion that Alice Henry, the widow, is entitled to receive the said sum of five hundred and forty-eight dollars and fifty cents.

Judgment for said amount of \$548.50 is hereby entered for the plaintiff. An exception is entered for defendant.

SELL v. COUNTY OF LEHIGH.

County Treasurer—Lehigh County—Salary—Special Act of March 16, 1867, P. L. 485—Act of June 17, 1913, P. L. 507.

The county treasurer of Lehigh County is entitled to a commission for collecting and receiving taxes formerly paid to the State but now retained by the county, under the Act of June 17, 1913, P. L. 507, notwithstanding the fact that the special act of March 16, 1867, P. L. 485, provides a fixed salary for said treasurer, in addition, however, to the compensation then received by him for the collection of moneys due to and for the use of the Commonwealth.

In the Court of Common Pleas of Lehigh County. No. 72 January Term, 1917. D. R. Sell v. County of Lehigh. Case Stated.

George M. Lutz for Plaintiff.

Francis J. Gildner, County Solicitor, for Defendant.

Groman, P. J., December 20, 1916. The question raised by this case stated is what construction is to be placed upon the special act of the legislature passed March 16, 1867, "Regulating the salary of the Treasurer of Lehigh County."

The general act of April 15, 1834, P. L. 544, Section 41 providing compensation for services rendered by county treasurers reads as follows: "Each county treasurer shall receive in full compensation for his services on behalf of the county, a certain amount per cent. on all moneys received and paid by him, which rate shall be

settled from time to time by the county commissioners with the approbation of the county auditors."

The special act for Lehigh County passed March 16, 1867, relative to the compensation of the county treasurer contains the following provision: "That from and after the first day of January, Anno Domini one thousand eight hundred and sixty-eight, the treasurer of the County of Lehigh shall be entitled to have and receive, (in lieu of the compensation now allowed by law,) a stated and fixed salary of ten hundred dollars per annum, in addition to the compensation now received by him, for the collection of moneys due to and for the use of the commonwealth."

The special act further specifically provides that "the forty-first section of an act of assembly, approved the fifteenth day of April, one thousand eight hundred and thirty-four, (so far as relates to the county of Lehigh,) as is inconsistent herewith, be and the same is hereby repealed."

On June 17, 1913, an act was passed which in substance provides that certain taxes theretofore collected and received by the county treasurer and paid by him to the state treasurer, and for which services the county treasurer received a commission, should thereafter be received and collected by the county treasurer, but retained by the county. The taxes so paid to the state treasurer by the county treasurer were usually designated state taxes.

The county treasurer presented a claim to the county commissioners for compensation for moneys received by him and formerly paid to the state treasurer. The amount claimed as due and owing is nine hundred and twenty-eight and 21-100 dollars. Payment was demanded but refused by the county commissioners; to expedite the disposition of the question involved, a case stated was agreed upon and submitted to the court.

The contention of the county is that since the Act of 1913 became effective, the county treasurer is no longer entitled to compensation for collecting and receiving taxes formerly paid to the state, but now retained by the county.

The attention of the court has not been called to any act repealing the special act of 1867 herein referred to, or

any part thereof. The title of the special act for Lehigh County reads as follows: "Regulating the salary of the Treasurer of Lehigh County." The term "regulate" or "regulating" is defined in a late edition of Webster as follows: "to adjust or control by rule, method or established mode; to direct by rule or resolution; to subject to governing principles or law;" the Century dictionary defines the term as follows: "to adjust by rule, method or established mode; govern by or subject to certain rules or restrictions; direct," so that the act in question by its title would indicate that it was passed for the purpose of adjusting, regulating or establishing a method of fixing the salary of the county treasurer. What are then the provisions of the special act relative to the salary of the county treasurer; how is the salary to be regulated; or on what basis is it to be established, adjusted or fixed? The special act provides first for "a stated or fixed salary of ten hundred dollars per annum," second, "in addition to the compensation now received by him for the collection of moneys due to or for the use of the commonwealth." The term "now" as used in the act is clearly and explicitly an expression of time, it relates to the conditions existing when the act was passed, was part and parcel of the very spirit of it and was to determine and fix the future salary of the county treasurer on a basis existing at the time of its enactment. No reference is made in the act to future contingencies or conditions that might arise, so that the conclusion may be fairly drawn that the salary in question was fixed and regulated as of the time when the special act was passed. At the time it was passed certain taxes were received by the county treasurer for the use of the state, and the compensation received by the treasurer from the state was the basis upon which part, at least, of the salary was "regulated" as the act has it. It is conceded that taxes collected by the county treasurer were paid by him to the state treasurer, and compensation was received by him for so doing until the act of 1913 was enacted. Since the passage of this act, the taxes so collected by the county treasurer are retained for the use of the county. The act of 1913 changes the recipient of the taxes; for all practical intents and purposes, however, the taxes received by the county treasurer and formerly paid to the state treasurer, and still collected, are ear-

marked and can be ascertained as a basis for fixing the salary or compensation of the county treasurer as provided for by the special act of 1867, and thus the act can be given full force and effect. The changes made by the act of 1913 do not repeal the special act in whole or in part; the provisions of the special act may still be effective.

Such being the conclusion reached, the court is of the opinion that the county treasurer is entitled to the salary of ten hundred dollars as provided for by the special act for Lehigh County, enacted in 1867, and in addition thereto the compensation formerly received by him for the collection of moneys formerly due to and for the use of the commonwealth, but since the passage of the act of 1913 retained by the county.

Now December 20, 1916, the Prothonotary is directed to enter judgment in favor of the plaintiff and against the defendant in the sum of Nine Hundred twenty-eight and 21-100 Dollars, with costs of suit.

IN RE ESTATE OF EZRA HILDEBEITEL, DEC'D.

Wills—Contingent Legacy.

Where there is a conversion of the estate into cash, followed by a bequest to a grandchild (naming him) of "one-fourth of the estate upon his arrival at the age of twenty-one years, should, however, my grandchild (naming him) die before he arrives at the age of twenty-one years without leaving issue, then his share shall be divided equally among my other three children above named," the legacy is a contingent legacy.

In the Orphans' Court of Lehigh County. No. 27 April Term, 1915. In re Estate of Ezra Hildebeitel, deceased. Exceptions to Auditor's Report.

Edwin H. Stine, for Exceptant.

A. H. Focht and Francis G. Lewis, for Executor.

Groman, P. J., October 16, 1916. The exceptions to the Auditor's Report practically raise one question only: Did Stanley E. Hildebeitel take a vested estate under the will of Ezra Hildebeitel? The clause in the will reads as follows: "Item. I give and bequeath to my grandchild, Stanley E. Hildebeitel, one-fourth of my estate

upon his arrival at the age of twenty-one years, should, however, my grandchild Stanley E. Hildebeitel die before he arrives at the age of twenty-one years without leaving issue, then his share shall be divided equally among my other three children above named."

The will also directs the executor "to sell at public or private sale all my real estate and personal property of whatsoever nature or description and convert the same into cash * * * ." Another item provides for distribution as follows: "After all my property has been converted into cash I order and direct and bequeath the same as follows to wit:" Then follow different bequests including the bequest first above referred to.

The will clearly works a conversion of the estate "into cash" and the disposition of it as personal property even though the sale was postponed for three years. *Leiper v. Thomson and Castner*, 60 Pa. St., Page 177; *McClure's Appeal*, 72 Pa. St., Page 414; *Roland v. Miller*, 100 Pa. St., Page 47; *Mellen v. Reed*, 123 Pa. St., Page 1; *Thomman's Estate*, 161 Pa. St., Page 444.

The legacy to Stanley E. Hildebeitel was given with directions to pay the legatee upon reaching the age of twenty-one years; was it then a gift at the age of twenty-one years or a present gift with payment to be made at the age of twenty-one years? Nowhere in the will is payment of any interest or maintenance or support out of the income of said share or out of the principal provided for, from which payments or directions to pay, the conclusion might be reached that the gift was intended to take effect presently. *Provenchere's Appeal*, 67 Pa. St., Page 463; *Reed's Appeal*, 118 Pa. St., Page 215.

The court, therefore, reaches the conclusion that a present gift was not intended, but that the will imported a gift at the age of twenty-one years, and that the legacy is a contingent legacy. This is in harmony with the conclusion reached by the auditor.

Now October 16, 1916, exceptions to auditor's report are dismissed; the executor is directed to hold the funds distributed to the grandson to await the happening of the contingency created by the will of Ezra Hildebeitel; he is also directed to place the principal at interest and give

bond in double the amount distributed to secure the payment of the principal upon the happening of the contingency provided for in the will.

CITIZENS NATIONAL BANK OF SLATINGTON v.
HUGHES.

Wills—Devises — Life Estate — Children — Rule in Shelly's Case.

Where there are devises to a son "during his lifetime, and thereafter to his surviving child or children, their heirs and assigns, forever," and "during his lifetime, and thereafter to his child or children, their heirs and assigns, forever," the words are words of purchase and not of limitation, and the estate of the life-tenant, sold in bankruptcy during his lifetime, ceases in the hands of the purchaser at his death.

In the Court of Common Pleas of Lehigh County. No. 59 April Term, 1915. Citizens National Bank of Slatington v. Esther I. Hughes and Jennie I. Hughes. Ejectment.

Frank Jacobs and Harvey H. Steckel, for Plaintiff.
Thomas F. Diefenderfer, for Defendant.

Groman, P. J., November 20, 1916.

FINDINGS OF FACT.

1. William L. Hughes died seized of the real estate described in plaintiff's statement excepting, however, one tract which plaintiff admits cannot be included in this proceeding.

2. William L. Hughes being so seized, disposed of said real estate in and by his last will and testament duly probated in the office of the register of wills of Lehigh County, Pennsylvania. The provisions of the will relating to the real estate in question are as follows: "Item. I give and bequeath unto my third and youngest son, William W. Hughes, the old homestead and store house, and fixtures, lot and appurtenances, thereunto belonging, situate on the south side of the public road leading from Slatington to Slatedale, in the village of Emerald, situate and adjoining other lot of my son, William W. Hughes, during his lifetime, and thereafter to his surviving child or children, their heirs and assigns forever.

"Item. I further devise and bequeath unto my son, William W. Hughes, the middle house and lot of the three block slate houses adjoining houses and lots bequeathed to Hugh W. Hughes and David W. Hughes, on the south side of Franklin street, in the village of Emerald, Lehigh County, Pa., during his lifetime, and thereafter to his child or children, their heirs and assigns forever."

3. William W. Hughes surviving the testator, died in the year 1914, leaving to survive him a widow, Jennie I. Hughes, and two minor children, Gordon G. Hughes and Esther I. Hughes; Gordon G. Hughes died in his minority without issue and left to survive him his mother, Jennie I. Hughes, and sister, Esther I. Hughes.

4. At the bankruptcy sale held during the lifetime of William W. Hughes all the right, title and interest of William W. Hughes in the real estate described in these proceedings was sold, and bought by the Citizens National Bank of Slatington.

5. This suit was brought during the lifetime of Gordon G. Hughes, and upon the death, the record was amended and the mother of said decedent added as a defendant.

CONCLUSIONS OF LAW.

The question to be determined is: are the words "surviving child or children" and "child or children" in the respective paragraphs of the will words of purchase or of limitation? If construed as words of purchase, as contended for by the defendant, the rule in Shelly's case would not apply as William W. Hughes would have had a life estate only; if construed as words of limitation, as contended for by the plaintiff, the rule in Shelly's case would apply, as then William W. Hughes would have had title absolute. The contents of the will nowhere throw additional light upon the language used by the testator; and the language used thus fully expresses the intention of the testator. What then was the intention of the testator relative to the remaindermen; were they to take as heirs of the first taker, or were they to become the source of a new succession? The language used to express the testator's intention is as follows: "My son * * * * during his lifetime, and upon his death to his surviving children, their heirs or assigns forever." The devise is to the son during his lifetime, and upon his death to his sur-

living child or children, their heirs. This indicated an intention on the part of the testator that the children of his son, William, should become the root of a new succession. Such being the case, the child or children of William W. Hughes took under the will as purchasers and not as heirs of testator, and the rule in Shelly's case would not apply. Guthrie's Appeal, 37 Pa. St., Page 13; Estate of Margaret Giffin, deceased, 138 Pa. St., Page 327. Then again, that the words "child or children" import words of purchase and not of limitation unless the intention of the testator cannot become effective in any other way is the gist of numerous decisions by the courts of Pennsylvania. Watson's Appeal, 125 Pa. St., Page 340; Fetherman's Estate, 181 Pa. St., Page 349; Crawford v. Forest Oil Co., 208 Pa. St., Page 19. The conclusion then is that plaintiff cannot recover, and a verdict for the defendant should be entered.

Now November 20, 1916, it is ordered that the Prothonotary forthwith give written notice to the parties in interest or their attorneys of the filing of this decision, and if no exceptions thereto be filed in the Prothonotary's office within thirty days after the service of said notice, judgment is hereby directed to be entered in favor of the defendant and against the plaintiff for the costs legally taxable in this proceeding.

STEPHEN ET AL. v. NIEMETI.

Wills—Devise—Life Estate—Estate Tail.

A devise to "my granddaughter (naming her), and if my said granddaughter should die before she is of age, or without leaving children as her heirs, then and in that case I give and bequeath the same unto my brothers and sister, share and share alike, their heirs and assigns forever," vests in said granddaughter an estate in fee simple.

In the Court of Common Pleas of Lehigh County.
No. 31 June Term, 1916. Amanda Stephen, et al. v. Josef Niemeti. Case Stated.

Thomas F. Diefenderfer, for Plaintiffs.
Francis G. Lewis, for Defendant.

Groman, P. J., October 16, 1916. The question to be

determined in the above case stated is: Did the fee to and in the real estate described in this proceeding vest in Helen J. Unger absolutely or did she take a life estate only. The language of the will is as follows " * * * * After the death of my said husband, I give and bequeath the same unto my granddaughter Helen J. Unger, a daughter of my son, Frank J. Unger, deceased. And if my said granddaughter Helen J. Unger should die before she is of age, or without leaving children as her heirs, then and in that case I give and bequeath the same unto my brothers and sister, share and share alike, their heirs and assigns forever."

The testatrix devised the real estate in question to the granddaughter as the first object of her bounty. The devise standing alone vested the title to the real estate in the granddaughter; what follows, indicates a succession in the event the devisee died before reaching the age of twenty-one, or without leaving children as her heirs. The courts of Pennsylvania rather favor a legacy as vested than contingent; the language to change the legacy from a vested to contingent legacy must be clear: *Neel's Estate*, 252 Pa. St., Page 405 (1916). When was the succession provided for in the will effective, before the death of the testatrix or after her death? In *Robinson's Estate*, 149 Pa. St., Page 423 (1892) we find the following language approved by the court: "In a leading case on this subject, (*Mickley's Appeal*, 92 Pa. St., 514,) Justice Sharswood says: 'If a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue, before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or what is practically the same thing, to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue, at any future period within the rule against perpetuities without clear evidence of such an intent.' See also *Caldwell v. Skilton*, 13 Pa. St. 152; *Stevenson v. Fox*, 125 Pa. 568; *McCormick v. McElligott*, 127 Pa. 230; *King v. Frick*, 135 Pa. 575."

It is conceded the granddaughter survived the testatrix; she, therefore, took a fee simple estate.

And again, the devise was to the granddaughter with a condition attached that in the event of her death before she was of age, or without leaving children as her heirs, to the brothers and sister of the testatrix, who would or could have taken as heirs to the first devisee under the intestate laws of the state of Pennsylvania, thus creating an estate tail, *Eichelberger v. Barnitz*, 9 Watts, Page 447; *Hackney et al. v. William Tracy et al.*, 137 Pa. St., Page 53, which under the provisions of the Act of April 27, 1855, P. L. 368, now in force, becomes a fee simple estate.

Now October 16, 1916, judgment entered for the plaintiffs and against Joseph P. Niemeti, the defendant, in the sum of \$2520.00.

TSCHIRKY v. TSCHIRKY.

Divorce—Trial by Jury—Public Morals—Act of April 20, 1911, P. L. 71—Constitutional Law.

The Act of April 20, 1911, P. L. 71, giving to the Court the power to refuse a trial by jury in divorce cases, when such would prejudice public morals, is constitutional.

In the Court of Common Pleas of Lehigh County.
No. 45 October Term, 1915. *Tschirky v. Tschirky*.
Divorce. Demand for Jury Trial.

A. G. Dewalt for Libellant.

Chas. C. Norris, Jr., and Morris Hoats for Respondent.

Groman, P. J., June 5, 1916. The respondent herein heretofore ruled the libellant to file a Bill of Particulars; after the Bill of Particulars was filed, the respondent demanded a jury trial as provided for by the Act of April 20th, 1911, P. L. 71. The court in its discretion refused a jury trial for reasons evident upon the most casual examination of the papers filed in this proceeding. The respondent, however, contending that the Act of April 20th, 1911 was unconstitutional, that question not having been raised in the rule heretofore disposed of, the court awarded a second rule on the libellant to show cause why a

jury trial should not be had. It was agreed by counsel in interest that the only question to be determined was the constitutionality of the Act of April 20th, 1911.

What is the constitutional provision, if any, relative to trials by jury in divorce proceedings? The constitution of 1874, Article I, Section VI provides that "Trial by jury shall be as heretofore and the right thereof remain inviolate."

The constitutions of the State of Pennsylvania of 1838, 1790 and 1776 contained the same provision. The question then arises: What was the right of trial by jury in divorce proceedings prior to the adoption of the Constitution of 1776, and when, what is now the State of Pennsylvania, was subject to the laws of England? The answer is found in a reference to Blackstone's Commentaries, Volume 3, Page 101, where it is stated that divorces in England were considered and granted by the ecclesiastical court by the judges therein, without trial of the issue at any stage of the proceedings, by a jury; such being the common law prior to the adoption of the Constitution of 1776, the court reaches the conclusion that the constitution of the state does not guarantee the right of trial by jury in divorce proceedings; in other words, the right not having existed prior to the adoption of the Constitution of 1776, no such right was created or guaranteed by constitutional provision. In *Van Swartow v. Commonwealth*, 24 Pa. St. Page 131 (1854) the Supreme Court of the State held "that trial by jury is as it was at the formation of the constitution and the right as it then existed does remain inviolate. * * * The purpose of the constitution undoubtedly was to preserve the jury trial wherever the common law gave it and in all other cases to let the legislature and the people do as their wisdom and experience might dictate." To the same effect is *Byers v. Commonwealth*, 42 Pa. St., Page 89 (1862), where it was held that the constitutional right of trial by jury was intended to preserve that right as it existed at the formation of our State government and not to increase or extend it, and must be construed with reference to the statutes that were in force in England and the province of Pennsylvania at the adoption of the first constitution of the State.

Did the legislature of the state enlarge the powers of

the courts relative to trial by jury in proceedings in divorce? The first divorce act was passed September 19, 1785, 2 Smith Laws, Page 343; that Act was repealed by the Act of March 13, 1815, 6 Smith Laws, Page 286, which act is still in force. The attention of the court has not been called to any other legislation relative to jury trials in divorce proceedings other than the Act of April 20th, 1911, P. L. 71, the act now under consideration. The title to the act reads as follows: "Supplementing and amending section two of an act, entitled "An act concerning divorces," approved March thirteenth, one thousand eight hundred and fifteen; regulating the submission of issues of fact to a jury, the appointment of masters in proceedings for divorce; defining the powers of the court and the practice in relation thereto. Repealing an act approved March tenth, one thousand eight hundred and ninety-nine." The act provides a method for regulating the submission of issues of fact to a jury, but in no manner infringes upon rights already safeguarded by constitutional provision. In line with the conclusion reached that the Act of 1911 is constitutional is the opinion of Judge Irwin in *Espay v. Espay*, 42 County Court Reports, Page 108.

Now June 5, 1916, for reasons hereinbefore set forth, the rule for a jury trial in this proceeding is dismissed.

RASELEY v. RASELEY.

Attorney—Privileged Communications.

An attorney at law, who had previously represented the libellant and also one named as co-respondent, cannot be called as a witness on behalf of the respondent in an action in divorce.

In the Court of Common Pleas of Lehigh County. No. 62 April Term, 1915. *John F. Raseley v. Viola Raseley*. Divorce.. Exceptions to Master's Report. Exceptions dismissed.

Butz & Rupp, for Libellant.
Dallas Dillinger, for Respondent.

Groman, P. J., June 5, 1916. A careful examination of the record and the testimony adduced before the

master and examiner convinces the court the master committed no error in recommending a decree in divorce in this proceeding unless the error is found in respondent's first exception which is as follows: "The learned master erred in not allowing and admitting Horace W. Schantz, Esquire, to testify in above proceeding." This exception standing alone might be serious, but an examination of the testimony by the court discloses the following state of facts: Horace Schantz is a practicing member of the bar of Lehigh County, and has been for a number of years; he was the attorney for the libellant in this case for an indefinite time; and also the attorney for one Frank Schiffert who is named as co-respondent in this proceeding. Mr. Schantz was called as a witness to testify in behalf of the respondent; he availed himself of his privilege, to refuse to testify on the ground that the communications to him were privileged because the relationship of attorney and client existed or had existed. A simple statement of the facts in the case practically answers the exception. This is a suit between husband and wife and not between the husband in this proceeding and Frank Schiffert. The co-respondent had no rights jeopardized in this proceeding, he was in no manner a party to the suit; his remedy, if any, was in another proceeding. It seems to the court the authorities cited by respondent's counsel are not altogether applicable to the question now before us. The rule invoked by the master is stated in 40 Cyc. 2361 as follows: "It is a general rule both at common law and under express statutes, that an attorney cannot, without his client's consent, divulge matters which were communicated to him in confidence by his client in the course of his professional employment. The object of the rule is to secure freedom in communications between attorney and client in order that the former may act with full understanding of the matters in which he is employed, and undergo no guise or subtlety should an invasion of the rules be permitted. The existence of the privilege is not dependent upon an injunction of secrecy by the client, nor is it essential that he should even know of the rule against disclosure."

The master had no alternative but refuse to allow the attorney to testify. The rule invoked is to be strictly kept and sacredly observed; the court cannot too highly

commend the learned master for his disposition of the question involved. Exceptions dismissed.

Now June 5, 1916, decree in divorce granted.

ANDERSON TO USE OF MALONE v. KERN, MORTGAGOR WITH NOTICE TO DAVIS,
TERRE TENANT.

Mortgage—Bond—Evidence—Adverse Witness—Surprise—Collateral Security—Defenses of Mortgagor and Terre Tenant.

A plaintiff may recover on a mortgage without producing the bond. This rule holds where a terre tenant is defending.

Where a plaintiff depends entirely upon documentary evidence, it is not necessary to submit to the jury whether they believe that testimony, but the court may give binding instructions for the plaintiff when such evidence makes out a case which entitles him to recover, provided the defendant offers no defense, or one which, if believed by the jury, is not sufficient to prevent judgment.

A party is bound by the testimony of his witness, so far as it is material to the issue, unless he was surprised by the witness' testimony or was under the necessity of calling him to supply a form of proof required by law.

Even though a witness proves adverse, and the party calling him was surprised, and it is shown that he had made prior contradictory statements, such statements are not received as substantive evidence, but only as neutralizing the effect of the witnesses' present testimony.

Where a purchaser agrees to pay for certain property by turning over to his vendor the promissory note of a third party and a stated sum of money, and in addition assigns as collateral security a mortgage with the understanding that it shall become the absolute property of the assignee if the said note and sum of money are not paid when the note becomes due and they are not so paid, the fact that the assignee had the note discounted and did not return it to his assignor does not affect his title to the mortgage.

The presumption that an assignment of a mortgage by a debtor to a creditor is collateral security for the debt does not arise on the trial of an action on the mortgage, where the plaintiff's testimony does not show that the assignee was a creditor and the defendant's evidence shows what the agreement and intention of the parties actually was at the time the mortgage was assigned.

As a general rule, when a mortgage is assigned absolutely, but is held by the assignee as collateral security, he can collect it, and the mortgagor or terre tenant cannot object, but where the rights of the mortgagee have been extinguished or acquired by the mortgagor or terre tenant, the latter may make any defence against the assignee that the mortgagee could have made.

Where in a suit on a mortgage assigned, it is proven or presumed that the assignment was intended as collateral security, it becomes the duty of the plaintiff to prove what it was security for. But where in such case the defendant, a terre tenant, has shown this in his evidence, the plaintiff is relieved from such duty, and is entitled to have a verdict directed on his documentary evidence alone, the defendant's evidence showing no defense.

Scire facias sur mortgage. Rule for a new trial. C. P. of Lancaster County. October Term, 1915, No. 36.

C. E. Montgomery, Coyle & Keller and B. F. Davis, for Defendant and Rule.

J. W. Kentworthy, Amos E. Burkholder, John M. Groff and John E. Malone, Contra.

January 13, 1917. Opinion by Hassler, J.

This is a sci-fa. on a mortgage, which is a lien on land owned by the defendant. We tried this case at March term last, and instructed the jury to find a verdict for the plaintiff. At that trial the defendant offered to prove that the mortgage was assigned to James G. F. Fowkes as collateral security, to secure him for his endorsement of a promissory note for \$1500. We refused to admit this testimony. The plaintiff obtained his title to the mortgage from the trustee in bankruptcy of said Fowkes.

In our opinion granting a new trial reported in 33 L. L. R. 393, we decided that while ordinarily a terre tenant cannot, in a proceeding to collect a mortgage by an assignee of it, make defense that it was assigned as collateral security by the mortgagee, there were circumstances in this case that took it out of the ordinary rule. On the authority of a number of cases cited in that opinion, we concluded that, as a general rule, when a mortgage is held by an assignee as collateral security, and the assignment is absolute on its face, the assignee can collect all that is due on it, and will hold all, in excess of the amount due him, as trustee for the mortgagee. It is a matter between the mortgagee and the assignee, and of no concern to the mortgagor or the terre tenant, as he or his land is liable for the whole amount and cannot be called upon to pay it twice. If the mortgagee loses because he has assigned it absolutely, it is his, and not the mortgagor's or terre tenant's loss. In this case the circumstances take it out of the general rule, for the reason that the mortgagee has dropped out of the transaction. Whatever rights he has in the mortgage have been extinguished or acquired by the terre tenant. Nothing is due, therefore, on the mortgage except what is due to the mortgagee's assignee, and this is now owned by the

plaintiff. That it was assigned as collateral security is, therefore, a good defense, and in excluding the defendant's offer to prove it we erred, and granted a new trial.

On the present trial we again instructed the jury to find a verdict for the plaintiff, and we are now asked to grant another trial. At this trial, the plaintiff proved by records and documents or writings, that on March 3, 1889, Emanuel Kern gave the mortgage in question to William Anderson. It was transferred by Anderson to James G. Fowkes on May 12, 1900, by an assignment absolute on its face. Fowkes was adjudged a bankrupt, and his trustee, on August 29, 1913, transferred all the interest of said Fowkes to John E. Malone, the plaintiff.

The mortgage is upon land located in Conestoga Township, this County, which was conveyed by William Anderson to Emanuel Kern, the mortgagor, on February 20, 1897, and by the said Kern to David Brewer on May 25, 1901, and by said Brewer to Conestoga Electric Light, Heat and Power Company on May 25, 1901. It was sold as the property of said company by the sheriff of Lancaster County on August 24, 1907, to B. F. Davis, the terre tenant, who is the defendant.

These facts are undisputed, and it is not questioned that whatever interest Anderson, the mortgagee and the assignor to Fowkes, had in the mortgage are extinguished, or have been acquired by the defendant. We, therefore, in accordance with our opinion referred to above (33 L. L. R. 393) permitted the defendant to offer testimony to show that it was assigned to Fowkes as collateral security.

The only witness produced by the defendant to show this was James G. Fowkes, the assignee of the mortgagee, through whom the plaintiff acquired his ownership of it. * * * He testified, and repeated it several times in his testimony, that it was assigned to him under the following circumstances and agreement. He sold a paint plant to William Anderson in 1900 for \$3,000. \$1500 of this amount was paid in cash, and \$1500 by a note of Jaek Brothers, dated June 5, 1900, payable to themselves in four months. This note was endorsed by Anderson. The mortgage was assigned to him by Anderson, it being agreed between them that if Anderson did not pay the \$1500, and the note for \$1500 when the note came due,

the mortgage was to be the absolute property of the witness. This he says was not his conclusion from what was said but it was a specific arrangement. It was what Anderson told him. Neither the \$1500 in cash or the amount of the note was paid when the note came due, nor has it been paid to Fowkes since. Fowkes had the note discounted at a bank in Camden, New Jersey. It was purchased by the defendant from the bank in February, 1914, at which time the bank assigned to the defendant all its interest in the mortgage in question. Fowkes had previously transferred two insurance policies to the bank to secure it for his indebtedness to it, which included this note. He testified that the policies had matured and been paid, and that part of, at one time he says all of, the note, had been paid from the proceeds of these policies of insurance.

We were of the opinion that this testimony did not show a good defense to this suit on the mortgage, and we gave binding instructions to the jury to find verdict for the plaintiff. This is now alleged by the defendant to have been error.

The first contention of the defendant is that it was a matter for the jury to decide whether it believed the testimony upon which the plaintiff relied to recover, and we should have submitted it to them.

Where a plaintiff depends entirely upon documentary evidence, it is not necessary to submit to the jury whether they believe that testimony, but the Court may give binding instructions for the plaintiff when such evidence makes out a case which entitles him to judgment, provided the defendant offers no defense, or one which, if believed by the jury, is not sufficient to prevent judgment. It is only where the plaintiff depends upon oral testimony in whole or in part that the Court cannot give binding instructions to find in his favor, as the credibility of the witnesses is for the jury, and the case must be submitted to them to pass upon it: *Bartlett v. Rothschild*, 214 Pa. 421; *Perkiomen R. R. v. Kremer*, 218 Pa. 641. The plaintiff here proved such facts, as entitled him to recover, by documentary evidence alone. He did not depend on oral testimony in whole or in part, and it was not necessary to submit to the jury whether they believed this testimony. The defendant relies largely

upon the oral testimony of James G. Fowkes. Even though the jury believed his testimony, it was in our opinion not sufficient to defeat the plaintiff's right to a judgment. It was, therefore, within our power to give binding instructions to find a verdict for the plaintiff.

But it is argued that if the jury only believed part of Fowkes' testimony and did not believe the other part it would have been sufficient to defeat plaintiff's right to recover, or cast the burden of proving certain other facts upon him. In other words, if the jury believed that the mortgage had been assigned to Fowkes as collateral security to secure him for his endorsement of the note of Jaek Brothers, and did not believe it was assigned to secure him for that and also for the other purchase money of the paint plant which was due him, and that it was not part of the agreement that the mortgage was to be his absolutely if the whole \$3000 was not paid on November 15, 1900, then the plaintiff was not entitled to recover all, if any of the amount claimed by him.

The difficulty with this is that James G. Fowkes was the defendant's witness. As a general rule, a party calling a witness thereafter holds him out as being worthy of belief, and cannot be permitted to impeach him or to show prior contradictory statements made by him: *Cowden v. Reynolds*, 12 S. & R. 281; *Smith v. Price*, 8 Watts 447; *Stearns v. Blank*, 53 Pa. 490; *P. R. R. v. Fortney*, 90 Pa. 323. While this rule as to impeaching or contradicting a witness is not so strictly enforced now as it formerly was, a party calling a witness is bound by his testimony so far as it is material to the issue: *Ayres v. Wattson*, 57 Pa. 360; *Gantt v. Cox*, 199 Pa. 208; *Com. v. Deitrick*, 221 Pa. 7. Even though a witness proves adverse, and the party calling him was surprised by his testimony, and the defendant is permitted to show that the witness made prior contradictory statements, such statements are not to be received or considered as substantive evidence of the facts mentioned in them, but can only be considered as neutralizing the effect of the witness's present testimony; *Northern Liberties Bank v. Davis*, 6 W. & S. 285; *Smith v. Price*, 8 Watts 447; *Stearns v. Merchants Bank*, 53 Pa. 490. A party calling a particular witness is not bound by his testimony if he is under the necessity of calling him for the purpose of

supplying some form of proof which the law requires. This condition arises when it is necessary to prove the execution of a paper by the subscribing witnesses, to prove the non-production of a paper by calling the supposed custodian of it, or proving statements made by a physician in filling out proofs of law under a life-insurance policy: *Fisher v. Gross*, 16 D. R. 292; *Morris v. Guffey*, 188 Pa. 534; *Harden v. Hays*, 9 Pa. 151; *Baldi v. Insurance Co.*, 24 Sup. 275; *Cowden v. Reynolds*, 12 S. & R. 281; *Hart v. Burns*, 4 Clark 337.

There was nothing to show that the defendant's witness Fowkes was adverse to the defendant. It was not satisfactorily shown that the defendant was justified in his allegation that he was surprised at the testimony. He was not such a particular witness as the defendant was required by some rule to call to supply some formal proof. Notwithstanding all this the defendant was permitted to show prior statements contradicting him. These statements, however, cannot be considered as substantive proof of the contract under which the mortgage was assigned to him by Anderson.

All that remains then is the testimony of the defendant's witness Fowkes, that the mortgage was assigned to him to secure him for the payment of \$3,000, the purchase money of the paint plant which he sold to Anderson, part of which was represented by the note of Jaek Bros., which was evidently given after original transaction, as that occurred on May 12, 1900, and the note is dated July 12, 1900, and that it was agreed between Anderson and himself that the mortgage was to belong to him, the witness, absolutely if the money was not paid when the note came due. That the money was not so paid, and according to the agreement the mortgage took the place of the purchase money and became the property of Fowkes. There are no contradictory statements in the testimony. All of it is necessary to prove the contract between Anderson and Fowkes. It was the defendant's testimony given by his witness, and he is bound by it. It proved a contract which is not sufficient to defeat the plaintiff's claim, and we could not have permitted the jury to have believed part and disbelieved the remainder of it, so as to find that a contract different from the one proven, was made.

Nor does the fact that the witness had the Jaek Brothers' note discounted and did not return it to Anderson affect the title which Fowkes acquired in the mortgage through his contract with Anderson. The contract was that it was to belong to Fowkes if the \$3,000 was not paid when the note came due. It was to take the place of the purchase money. The burden was on the defendant to prove that the note was payment pro tanto of the paint plant money. The witness says it was, but if Anderson did not pay him that amount and the other \$1,500 when the note came due the agreement was that the mortgage was to be his absolutely. This showed that the Jaek Brothers note was not accepted as payment pro tanto. The witness had it discounted by endorsing it, thus becoming liable for its payment. Neither Jaek Brothers nor Anderson have ever paid it. Fowkes says his insurance policies have paid some of it. As Jaek Brothers or Anderson have not paid, or if the proceeds of these policies have not done so, or his discharge in bankruptcy has not relieved him from its payment, and there is no proof that it did, he is liable on it at the present time. The purchase of it by the defendant does not relieve him from that liability. If Jaek Brothers or Anderson had paid it, or paid him \$1500 with which to pay it, then it should have been returned to Anderson, but it not having been paid, it was not necessary for him to return it in order to complete his title to the mortgage acquired by the terms of the contract with Anderson.

It is contended further that there is a presumption of law that the mortgage was assigned to Fowkes as collateral security, and the burden was on the plaintiff to show what it was given to secure and it was a question for the jury to decide whether he had incurred any liability for which the mortgage was liable and which the plaintiff was entitled to recover.

If the mortgage was assigned as collateral security, and this was proven or presumed, it became the duty of the plaintiff to prove what the mortgage was liable for before the plaintiff could recover, as the rights of the mortgage are now held by the terre tenant. This would have been necessary, however, only in case the proof or presumption that it was given for collateral security is all that there was proven, but the defendant's proof went

further. He proved not only that it was assigned to Fowkes as collateral security, but in addition, all the terms of the contract by which it was so assigned to him, and these terms show just exactly what it was collateral security for, and they were that it was to become the property of Fowkes if Anderson did not do what he had agreed to do.

The presumption that it was assigned as collateral security does not arise as part of the plaintiff's case, simply because it was assigned and it was, therefore, not necessary for him to prove as part of his case what it was assigned to secure. The cases which the defendant relies on, decide that where the relation of debtor and creditor is shown to exist between an assignor and his assignee, the assignment, of choses in action, such as a mortgage, is presumed to be as collateral security, and not an extinguishment of the debt, so that the creditor may proceed to collect all of his claim if the collateral security proves worthless, or the balance of it, if only part is realized from the chose in action so assigned. The case he relies on particularly is *Eby v. Hoopes*, 1 Pennypacker, 175, where a husband was a debtor of his wife to a large amount, and assigned a judgment and a mortgage to her by assignments absolute on their face. Only part of her claim against him however was realized on the judgments and mortgage. Her executors then sued the husband for the balance, and he made defense that the judgment and mortgage were assigned in full payment of the claim. Justice Green said, "Whether such assignment is in payment or as collateral security is certainly a question of intention, depending upon the testimony in the particular case. In the absence of evidence tending to show an intention to pay and receive the securities assigned as satisfaction of the debt, in whole or in part, the law presumes that they were assigned only as collateral. The duty of establishing the contrary is affirmative and rests upon the debtor. If he fails to perform this duty the law makes a positive inference that the assignment is only as collateral security, and that inference is substantial evidence upon which the creditor may rely." In *Leas v. James*, 10 S. & R. 307, it is said, "when the defendants set up the assignment of the bond, as a payment, it is incumbent on them

to prove that it was so intended. The writing itself shows no such thing, and in cases where a chose in action is assigned by the debtor to the creditor, I think the presumption is, that it was not intended as an absolute payment, unless it is so expressed. The reason of this presumption is, that such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." In *Peritt v. Pittfield*, 5 Rawle 166, it is said, "The general principle is, that property placed by the debtor in the hands of the creditor is not to be construed as received in full discharge of the debt, unless that plainly appears to have been the intention of the parties."

No presumption arises here from testimony on the part of the plaintiff, because it did not appear in it that Anderson was indebted to Fowkes when the assignment was made. No presumption can arise from the proofs on the part of the defendant that such relation did exist at the time, for the reason that he proved the whole transaction or contract involved in the assignment of the mortgage, what the agreement was, and what was the intention of the parties to it. He did this by the testimony of Fowkes, who testified that it was assigned as collateral security for the payment of \$3,000, and that it was agreed and so expressed that at a certain time, it was to be taken in payment of the whole sum, if it was not then paid. The mortgage put no money into the hand of the creditor, but if he agreed to accept it in payment he is bound by that agreement, and if it was not worth the full amount of his claim, and he could not realize that much on it, it would bar him from further recovery. On the other hand if from it he realized more than his claim, it was to his advantage. He took this chance in accepting it in payment of his claim. This was the plain intent of the parties and so proved by the defendant. It prevented any presumption as to why it was assigned arising. If the plaintiff had proven this and depended on it to recover, we would have had to submit it to the jury, but it having been proven by the defendant and not being sufficient to prevent plaintiff's recovery, it was not necessary to submit it to the jury for the reason that their belief of it or refusal to believe

it, was immaterial. If they believed it, the plaintiff was entitled to a verdict and the same result would follow if they did not believe it.

Some testimony was offered of what Anderson did and said after he assigned the mortgage to Fowkes. This cannot be considered, as it was shown that Anderson had no interest in the mortgage at the times these things occurred, and they were not therefore admissions against his interest. The assignment of the trustee in bankruptcy of Fowkes to the plaintiff is, in our opinion, sufficient to vest title in him of all the interest of said Fowkes in the mortgage.

It is also contended that the plaintiff is not entitled to recover because the bond was not produced at the trial.

While the rule in some states requires the production of the bond before a mortgage can be admitted in evidence, and Judge Mayer, in *Tyson v. Seitz*, 15 D. R. 702, (1906) followed this rule, we find that the Supreme Court of this State about the time of Judge Mayer's decision decided that the production of the bond is not necessary; *Brownell v. Oviatt*, 215 Pa. 514. In that case it is said, "One of the errors assigned is that the mortgage was admitted in evidence without the accompanying bond. If the bond had been paid, its payment would have been a complete defense to the suit on the mortgage, but the burden was upon the appellant to show that it had been paid. The appellee's suit was on the mortgage—a cause of action separate and distinct from that on the bond—though both were for the same debt. In proceeding on either it is not incumbent on a plaintiff to show that the other has not been paid. In an action on the bond, when the holder produce it, there is a presumption that the mortgage has not been satisfied, and so in a proceeding on the mortgage against the land, there is a like presumption that the bond has not been discharged. The objection to the offer of the mortgage without the bond was properly overruled." From this it is clear that the plaintiff was entitled to recover even though the bond was not produced at the trial. There is no merit in the contention of the defendant that the decision does not apply in a case where the terre tenant is defending. There seems to be a stronger reason for its application

in such a case than where the mortgagor is doing so, as the terre tenant is not personally liable on the bond, and he bought the land knowing that the mortgage was a lien on it. So long as the mortgage is not satisfied the presumption exists, that the bond has not been paid.

The other questions raised in the reasons for a new trial are not material, if we were right in giving binding instructions to the jury to find a verdict for the plaintiff, and as we think we were right in doing so it is unnecessary to discuss them. We are satisfied that our action in giving binding instructions was correct, and, therefore, discharge the rule for a new trial.

VOLMER v. GRIM ET AL.

Landlord and Tenant—Excessive Distress—Action for Damages—Statute of Marlbridge.

Where the testimony shows that a landlord, through his bailiff, levied on his tenant's goods to collect rent admittedly due, and the averment in the pleadings is that the landlord levied on more goods than were necessary to pay the rent, and that this caused a creditor of the tenant to issue an execution for a debt, which was admittedly due, by the tenant to his creditor, the landlord cannot be held liable to pay damages, especially when the tenant voluntarily confessed judgment for the sum for which execution was issued, and where there is nothing in the pleadings to show that the tenant has any other cause of complaint, and nothing in the evidence to establish any damages, the tenant cannot recover even nominal damages.

Fred Vollmer v. Jacob L. Grim and Henry Dresher. Trespass. In the Court of Common Pleas of Northampton County, No. 10 September Term, 1915. Judgment for defendants by direction of the Court. Rule to show cause why a new trial should not be granted. Rule discharged.

H. C. Cope, for Plaintiff.

John D. Hoffman, for the Defendants.

The opinion of the court was delivered Nov. 6, 1916 by

Stewart, P. J. This is a rule for a new trial. Upon the trial the jury, by direction of the court, returned a verdict for defendants. The reasons now assigned for a new trial, are the formal direction of the court, as above

stated, and specifically as follows: "6. The court erred in not submitting to the jury the question as to whether or not under the circumstances of the case, the levy under Grim's distress warrant and failure to appraise the goods levied on and make sale was the immediate cause of the issuing of the execution on the judgment confessed to S. E. Miller whereby the same goods bound by said distress warrant were sold, as bearing on the question whether or not the goods distrained were followed by an appraisement and sale. 7. The court erred in not submitting to the jury the question as to whether or not the levy under the distress warrant was excessive." When we turn to the plaintiff's statement we find that he declared that he was a tenant of the defendant Grim; that on the 12th of January, 1915, he owed Grim \$120.00, that Grim wrongfully, unlawfully and unjustly seized, took and distrained an unreasonable and very great distress. Then followed a number of articles. The second paragraph alleged that Grim was required by law, to appraise these articles and that he refused and neglected to appraise them; that on January 19, 1915, they attempted to adjust their differences, and on January 21, 1915, plaintiff's attorney notified defendants' attorney to proceed to appraise the goods: and he alleges that defendants' attorney instructed the constable to make no appraisement. His averment then is as follows: "Wherefore, by reason of said proceedings in distraint and the refusal to release said goods and chattels from said distraint, an execution was issued from the Court of Common Pleas of Northampton County against said plaintiff in the sum of \$641.69 at the suit of one S. E. Miller on January 25, 1915, and on the same day the said goods and chattels were duly levied on and seized by the Sheriff of Northampton County, advertised for sale and on February 2, 1915, sold at Sheriff's sale for the sum of \$641.15. Subsequently, said J. L. Grim served upon the said Sheriff a notice in writing claiming out of the proceeds of said sale the said sum of \$120, the amount for which he had issued his warrant of distress." In the subsequent paragraphs there is a repetition of the same allegations. It will be noticed that the plaintiff nowhere alleges that he was put to any inconvenience in his busi-

ness, or in his household affairs, or that he was unable to give bond in replevin. His sole allegation which would give him a right to damages, is that a sheriff's sale resulted from the unreasonable distress. In fact he could not have stated more for the undisputed testimony was that the restaurant had been closed for two days before the distress, and there was not the slightest interference at any time with the plaintiff's property by either of defendants, nor did they refuse to release the goods upon demand of the plaintiffs nor did they cause this sheriff's sale. The only thing that they did, taking the plaintiff's case at its strongest, was to take a paper levy on too large an amount of plaintiff's goods. It appeared in evidence that the plaintiff and his wife, on January 18th, gave a note payable one day after date, to S. E. Miller, for \$640.00, which was entered in court on January 25th, and execution issued upon the property. How can this plaintiff, in view of the fact that he confessed a judgment for \$640.00, due and payable in one day after date, say that he was injured because he did not pay that note and execution was issued on it? To merely state the proposition is to answer it. There is nothing in the sixth reason. This brings us to the difficulty which confronted us at the time of the trial, which was whether we should submit the case to the jury, and tell them that plaintiff could only recover nominal damages, or take the case entirely from the jury. It plainly appears from what was held in *McKinney v. Reader*, 6 Watts, 34, that plaintiff's action is an action on the case founded on the statute of Marlbridge. In that case the supreme court said on page 40: "The court below say, in their charge to the jury, 'In this case there is no evidence of any notice of the distress taken, with the cause of such taking, having been given to the tenant or left on the premises. This omission is fatal to the proceedings of the defendants. It renders their whole proceedings under the right of distress illegal, and takes from them that ground of justification.' In this we think the court erred; for, at common law, such notice was not required; and would seem to be necessary, under the act of assembly only, in order to warrant a sale of the distress agreeably to the directions thereof. But as no sale was made of the distress in this case, the mere omission to give the

notice required, cannot, of itself, be considered sufficient to make the landlord a trespasser ab initio. A mere non-feasance does not amount to a trespass. The Six Carpenters' case, 8 Co., 146. But here it may be said, that the landlord evinced his intention to proceed and sell; but certainly that was all he did; and at most, it was only a declaration of intention, which will not, without some act done in pursuance of it, constitute a trespass. There must be some positive act done, that is incompatible with the right of the party to make the distress, in order to render him a trespasser ab initio; *Gates v. Lounsbury*, 20 Johns. Rep., 427. The court below also seem to have thought, that if the defendants distrained for more rent than was due, they thereby became trespassers. In this we also think there is error; for it is in effect but an excessive distress, which at common law was perfectly allowable; because it was more likely to induce or compel the payment of the rent due. And until the statute of Marlbridge, 52 Hen., 3, c. 4, there was no restriction upon the landlord in this respect. By that statute, however, it was provided, 'that all distresses should be reasonable, and that persons taking unreasonable distress should be grievously amerced for the excess of such distress.' But, notwithstanding the provisions of this act, it has been settled that the entry and distress being lawful in part, for the rent actually due, and the whole being only one act, trespass will not lie; that it is not like the case of a subsequent abuse of the distress. But the proper remedy is an action on the case founded on the statute of Marlbridge, 3 Lev., 48; *Lynn v. Moody*, Fitzg., 85; S. C. 2 Stran., 856; *Hutchins v. Chambers*, 1 Burr., 590." To the same effect is *Thomas v. Gibbons*, 21 Pa. Super Ct., 635. To understand that statute, it should be read in full. We quote from Roberts's Digest, page 170, as follows: "None from henceforth shall cause any distress that he hath taken, to be driven out of the county where it was taken; and if one neighbor do so to another of his own authority, and without judgment, he shall make fine (as above is said) as for a thing done against the peace: Nevertheless, if the lord presume so to do against his tenant, he shall be grievously punished by amerciamment. Moreover, distresses shall be reasonable and not too great. And he that taketh great and un-

reasonable distresses, shall be grievously amerced for the excess of such distresses." The statute was passed A. D. 1267. The author goes on to say: "It appears that in those days the most high-handed oppressions had been carried on by the barons, and other powerful men; who, refusing to submit themselves to the laws, and contemning an appeal to them, gratified their revenge, their avarice, and their caprice without restraint. It has been long felt as a grievance, that distresses were most oppressively used; and if complaint was made of the oppression, the barons insisted upon determining the complaint against their own officers, in their own courts, and would not permit the king's courts to hold cognizance. These powers which they had failed to obtain when the statute of Merton was passed, they usurped during the troubles which succeeded that period." Again he says: "At the common law, a man might have driven, or carried a distress whither he pleased, which was very mischievous;—because, if cattle were taken, the owner was bound to find them, and to give them sustenance if impounded in a pound overt; and yet, when they were esloined into another county, by common intendment, he could have no knowledge where they were, and of course might frequently be unable to replevy them." At the common law the landlord took the goods distrained into his possession, and it is significant that the language of the statute is "he that taketh," etc. It may be conceded that if the plaintiff had declared that his business was interrupted, and had proven the fact, or if somebody had been left as an agent of the landlord to look after the goods, and he had intruded himself upon the tenant's family, or if he had tried to get sureties in a replevin suit and had failed, that he would have been entitled to at least nominal damages. But no such thing occurred here, and to say that nominal damages could be recovered where the only proof was that not a particle of damage had been done by the defendants, would be to allow a statute which was passed 600 years ago to meet the conditions which existed then, and which do not exist now, and which was intended to punish flagrant abuses, to govern the present case, which has no resemblance to a case contemplated by the statute. In our judgment the case which we cited in our charge to the jury, *Holland v.*

Townsend, 136 Pa. St., 392, bears very strongly on the present case. The syllabus of that case is as follows: "Under sec. 1, Act of March 21, 1772, 1 Sm. L. 370, authorizing the sale of a distress for rent 'after six days' public notice,' it is not essential to the legality of the proceeding that the sale take place on the day fixed by the notice. As an incident to the power to sell, the bailiff has power to make a reasonable adjournment of the sale. An adjournment for one week is a reasonable delay, and will not of itself convert a lawful distress into a trespass; nor is it necessary, in an action of trespass for a sale made after such adjournment, that the cause of the adjournment should affirmatively appear: *Ricketts v. Unangst*, 15 Pa., 90, and *Quinn v. Wallace*, 6 Wh., 452, explained. A landlord has the right to impound a distress upon the premises for a reasonable time after the expiration of the five days allowed to the tenant by the Act of 1772 for bringing replevin, which, ordinarily, will be until the day of sale in due course; and he may take exclusive possession of that part of the premises in which the distress is impounded." The learned referee set forth his conclusions on page 396 et seq. The same authorities now cited, notably *McElroy v. Dice*, 17 Pa. St., 163; *Brisben et al v. Wilson*, 60 Pa. St., 452; *Hoeverler v. Fleming & Co.*, 91 Pa. St., 322; and *Quinn v. Wallace*, 6 Wharton, 452 were pressed on his attention. His conclusions favored the view of the learned counsel for the plaintiff. Mr. Justice Green reversed the judgment without a venire. His reason is unanswerable. He shows conclusively that *Quinn v. Wallace*, 6 Wharton, 452 is not to be read as now contended by the learned counsel for the plaintiff. He holds that there was nothing in that case to found any award of damages on. It is true that that case was on the Act of 1772, but the same reasoning applies to the present case. If this is an action on the case, some injury must be alleged and proven. In the present case the only injury alleged was not caused by the defendants. Hence they are not liable for even nominal damages. We have been referred to no cases where mere proof of an excessive distress is, without an averment of some damage which is real and not fanciful, considered sufficient under the statute of Marlbridge, and the very great diligence displayed by

the learned counsel on each side in this case, leads us to believe that there is no such case. The nearest case is *Bail v. Inter-State Cemetery Co.*, 10 Del., 59. That case is not fully reported. Neither the pleadings nor the facts are given. Judge Johnson seemingly decided that under the pleadings and facts of the case, a verdict for \$50.00 should not be disturbed. One other case cited by the learned counsel, should be noticed, *McElroy v. Dice*, 17 Pa. St., 163. What Mr. Justice Lewis said on page 168 about the effect of a distress, must be considered with respect to the matter which was before the court, which was whether a settlement was a bar to a wrongful distress. In that case the distress was for three-quarters of a year's rent. One quarter was not due. All the cases make a distinction between a distress for more rent than is due, and a distress on more property than is required to pay rent that is admittedly due. We feel that under the pleadings in this case there can be no recovery at all. If the learned counsel for the plaintiff still thinks that his sixth reason is a good one, he will have to be upheld in that view by the supreme court, as after listening to his excellent argument, and after a careful examination of all the authorities which he cited, we are fully persuaded that there is no real merit in his case.

And now, November 6, 1916, rule for a new trial is discharged.

RUMMEL v. BOLTON.

Opening Confessed Judgments Given in Consummation of an Agreement to Sell Real Estate by the Delivery of Deed—Deficiency in Land Conveyed—Acknowledgments of Married Women.

Where a contract of sale is executed by the delivery of a deed and the giving of an obligation for the purchase money, the general rule is that the vendee can have no abatement for a deficiency in the quantity of the land.

Presumably a deed made to consummate what was only executory in the preliminary agreement, and accepted as such consummation by the grantee, is a correct embodiment of what the original agreement was designed to cover. If there is not something shown to make that inference incorrect, the description of the deed must be regarded as a construction placed by the parties on what is contained in the preliminary agreement. Therefore, until fraud, accident or mutual mistake is made to appear, with reference to the contents of the deed, to

correctly show a basis wherefrom to measure the contracted rights and obligations of the parties, whether the same thing was unquestionable manifest from an inspection of the original agreement or not, a purchaser who agrees to buy land at a certain price per acre is bound to pay at that price.

Where an agreement of a sale of land is consummated by payment of the consideration or giving a purchase money security and the delivery of the deed, there can be no recovery for deficiency, without proof of fraud, accident of mistake. Deficiency if it be very great, though evidence of fraud is not itself sufficient.

Where a deficiency in the land conveyed is offered as a reason for opening a purchase money judgment, the deficiency being that a portion of the land conveyed was covered by the right of way of a railroad, but it does not appear by clear, precise and indubitable evidence that the right of way was erroneously included in the deed, or, if properly there that, according to the agreement with the plaintiffs, it was not to be paid for at the agreed price per acre, it was held such reason was insufficient and that the judgment should not be opened.

Where it is alleged as a reason for opening a purchase money judgment that one of the grantors, with her husband, had not acknowledged the deed, it was held that while a married woman cannot ratify a former deed lacking an acknowledgment in any other way than by a deed properly acknowledged, yet where she has tendered a deed of confirmation to the defendant properly acknowledged, the defendant has no longer any right to withhold payment of the purchase money on account of the defect, and such objection is not a good reason under the circumstances for opening the judgment.

In the Court of Common Pleas of Westmoreland County, Fi. Fa. Nos. 578 and 579, Feb. Term, 1913. Rule to open judgments.

Bell & Bell, for Plaintiffs.
Wm. S. Rial, for Defendant.

McConnell, J. With respect to the judgment at No. 579, February Term, 1913, Fi. Fa. No. 85 May term, 1913, the testimony shows no reason for opening the judgment, and, as to it, defendant's application must be dismissed, at his cost.

With respect to judgment No. 578, February term, 1913, Fi. Fa. No. 84, May term, 1913, the application requires a more detailed examination of its merits, before determining what decree is the appropriate one to make. The written agreement that preceded the making of the deed is dated the 22d day of May, 1903, but the deed and note upon which judgment has been entered were not delivered until after that, to wit: on or about November 4th, 1906. On the note in question are the following endorsements of credits: "Interest paid to Nov. 1, 1907;

Interest paid to June 1, 1909; Oct. 4, 1910, Pd. on acct. of interest \$20.00; Interest paid to Nov. 1, 1910; Cr. 23 Dec., 1911, paid \$150.00; 23 June, 1912, paid \$50.00."

After these payments on account had all been made, and after an execution had been issued on the judgment for the collection of the balance due, to wit, on the 18th of April, 1913, the defendant's petition, praying that the judgment might be opened, was presented to Court, and, upon that basis, the pending rule was granted. The attack is, therefore, made upon a judgment formulated by the parties themselves, and recognized by them for years as being binding according to its tenor.

"Where a contract of sale is executed by the delivery of a deed and the giving of an obligation for the purchase money, the general rule is that the vendee can have no abatement for a deficiency in the quantity of the land." *Baker v. Barley*, 34 Sup. 169. "Where the purchase of real estate is fully closed by conveyance and payment, or security of the purchase-money, the law is well settled that a vendee, who does not offer to rescind and reconvey the property to his vendor, can only recover where his evidence makes a clear, strong case. Where he holds fast to the property purchased, and seeks to recover a portion of the purchase-money or damages, there is a strong presumption that his deed conveyed what he purchased, and the burden rests heavily upon him to overcome this by sufficient testimony. The law will not permit him to recover, in such case, on weak and unsatisfactory evidence." *Schmitz v. Roberts*, 26 Sup. 472.

This rule should receive special emphasis in a case like this where the complaint as to the quantity of land conveyed is not made by defendant for more than six years and six months after the delivery of the deed, and the giving of the security, and in the meantime six payments have been made on account of that security, without any complaint that it is incorrect. "Prima facie, the presumption of law arising from the acceptance of a deed by a vendee is that it is an execution of the whole contract to convey, and the rights and remedies of the parties are to be determined by it, and the original agreement becomes null and void." *Wilson v. McNeal*, 10 Watts, 422. That the deed was intended to be the con-

summation of the agreement in this case is an express averment of the petition to open.

(1) But the substance of the petition is to the effect that the deed and the executory contract differ from each other, and the attempt of the petitioner is to measure the extent of his obligation to pay, by what he says the original agreement shows, and not by what the deed, which was the consummation of the executory agreement, and the note given when that deed was delivered, show. "An article of agreement for the sale of land is merged in the deed made in pursuance of it which is delivered and accepted." *Jones v. Wood*, 16 Pa. 25. On pages 38 and 39, Justice Bell, speaking for the Court says: "As a general rule, by such acceptance, the parties to the transaction are absolutely precluded from looking behind the conveyance for subjects of strife, suggested by their previous negotiations and contracts; for the last step is esteemed as indisputably expressive of their final conclusions." This should receive particular emphasis in a case wherein the description of the land in the executory agreement is vague, and purports by its terms to designate no acreage of land at all, but nevertheless provides for a sale, at so much per acre. In such a case, the agreement obviously looks forward to the making of a survey subsequently and before the making and delivery of the deed. In such case, the deed, not the agreement, is to be relied on to show the description and contents of the tract conveyed. "Where a sale of land is by the acre, the right of ascertaining the quantity by a survey exists, whether reserved or not, and if no time be limited, it may be done at any time before the business is closed. But where articles of agreement are carried into execution by conveyance and bond from the vendee, there, in general, the contract is considered as closed; unless, in extreme cases, showing misapprehension or fraud." *Bailey v. Snyder*, 13 S. & R. 160. "The articles being executory, the quantity and sum to be paid are to be ascertained by survey." *Ullom v. Carpenter*, 81½ Pa. 503.

An illustration of what is meant by "an extreme case" in *Bailey v. Snyder*, is given by Justice Tilghman, on page 162: "For instance, a case in which the real differs so much from the estimated quantity of land, as to make it evident, either that both parties were under a

misapprehension, or one of them guilty of gross fraud.”

The defendant must show a case of mutual mistake, or of fraud perpetrated upon him by the plaintiff, in order to successfully attack the correctness of what an accepted deed shows with respect to what the quantity of land is, that is intended to be conveyed and paid for. The burden of showing that rests heavily on the defendant. The presumption of law is altogether the other way. The agreement to which he appeals for proof, mentions no acreage whatever, and the description contained therein is so vague that it could not have been specifically enforced by decree. The defendant knew, and the plaintiff knew and intended that the vagueness and indefiniteness of the agreement was to be made precise by the survey thereafter to be made, and in accordance with that survey when made the deed was to be written. It is obvious that the parties were not to rely on the description contained in the agreement, as the one that was to go into the deed; therefore, precision and definiteness were to be looked for only when the survey and the deed were made. The acceptance of that deed, the recording of it, and the holding of it for all these years, without complaint, makes the petitioner's burden, in asserting the incorrectness of description of the subject-matter, an extremely onerous one. The description in the agreement is: “All that portion of ground situated in Sewickley Township, Westmoreland County, Pa.: The portion of land west of Hempfield branch railroad, except the old homestead, and also that portion of land lying south of the aforesaid railroad, except that land now marked off in lots.” It is now the contention of the defendant that that is descriptive of two distinct tracts—one on each side of the railroad, while there has been conveyed to him one tract, which, although embracing the two, nevertheless also embraces the land lying between the two, and occupied by the Hempfield Branch railroad. It is the defendant's contention that this intervening land was not to be paid for at the rate of \$110.00 per acre, as the agreement liquidates the consideration. Whatever might be thought about the construction to be placed on these words of description, if the Court were called upon to place a construction thereon without other aid than the words themselves—we are now, however,

not permitted to thus construe them in their isolated situation, for the parties themselves have necessarily, according to legal construction, construed them, in consummating the deed made in pursuance of them, unless the form of description given in the deed is shown to have been made by mutual mistake or fraud perpetrated by plaintiffs on defendant. The deed, accompanied by a draft showing courses and distances, and a statement of the acreage contained within the lines, as shown and described in both the draft and deed, is offered in evidence. They were made by the plaintiffs and accepted by the defendant as being correct. The draft shows to the eye, and the words of the deed apprise the understanding that the deed conveys but one tract, subject however, to the right of the railroad company thereon. It is conceded that this draft and deed were intended to be a representation of what the preliminary agreement was designed to cover. No error of measurement or calculation is shown, if that be the correct subject-matter of the conveyance. Presumably a deed made to consummate what was only executory in the preliminary agreement, and accepted as such consummation by the grantee, is a correct embodiment of what their original agreement was designed to cover. If there is not something shown to make that inference incorrect, the description in the deed must be regarded as a construction placed by the parties, on what is contained in the preliminary agreement. Therefore, until fraud, accident, or mutual mistake is made to appear, with respect to the contents of the deed, we must regard what it contains to correctly show a basis wherefrom to measure the contracted rights and obligations of the parties, whether the same thing was unquestionably manifest from an inspection of the original agreement, or not. By the deed there is one tract described, but that one tract is made subject to the rights of the Hempfield Branch railroad, theretofore acquired and obviously existing before the making of both the agreement and the deed. In that, the error now alleged by the defendants, consists.

The substance of the complaint is, not that defendant has had conveyed to him less than what the agreement promised him, but that he has had conveyed to him more than was promised—for the land occupied by the

railroad right of way has been conveyed to him—but subject to the previous rights of the railroad. This area has been computed as a part of the acreage of the tract conveyed. That computation, of course, augments the acreage beyond what defendant says it should be, and defendant, being obliged to pay for the acres, is therefore, required to pay more than he would if the railroad right of way was not included as a factor in calculating the extent of his obligation. The acreage of the railroad right of way is 3.217 acres, and, by that number of acres, defendant claims he has been charged too much, and that he should not be charged at the rate of \$110.00 per acre for the land so occupied. He, therefore, seeks to have deducted from the above obligation, which represents a part of the purchase price of the land, the cost of 3.217 acres of land at \$110.00 per acre, or \$353.87.

On the other hand, the plaintiffs claim that, at the time of making the agreement, as well as at the time of making and delivering the deed and note, the land was a unit, albeit a strip thereof was then subject to an obvious easement in favor of the Hempfield Branch railroad. That the railroad did not own the strip of land occupied by it, after the manner of a man who owns a farm by virtue of a deed, but that it only had an easement therein, acquired through condemnation proceedings, the residue of the title outside of that easement, remaining as before. That the description in the agreement was only designed to fix the locality of the tract for purposes of identification, and not for purposes of minute description; and more than this, that both parties were entirely familiar with the tract, and both knew of the occupancy of a part of it by the railroad.

It is not impossible to so construe the description in the agreement as to accord with this contention. In the description, the vague word "portion" is used three times—and obviously not always in relation to the same thing. The first clause wherein it is used is in these words: "all that portion of ground situated in Sewickley Township, Westmoreland County, Pa., viz.:" This obviously refers to but one entire tract, and not to a number of distinct tracts. It holds up to view a single unit. It is therein alone that the location of whatever is to be conveyed is given. All that follows the word "viz" is only

for particular mention of something that has already been comprehended in the general language that goes before. If the description, instead of being in the form in which it actually is had been: "all that tract of land situated in Sewickley Township, Westmoreland County, Pa.—a portion of it lying on the west side of the Hempfield Branch railroad and a portion thereof lying on the south side of said railroad"—it would not, in meaning, be substantially different from the significance of the words we actually find there. This, we say is not at all an impossible construction of what we find in the agreement—and when the parties have afterwards, for the purpose of executing the agreement, made and accepted a deed wherein the description accords with such a construction, it can well be considered that that is the construction that the parties have themselves placed on the agreement. It is, indeed, not necessary that the deed should accord with the agreement, for the deed is the last and most explicit statement of what the parties have finally concluded—and it could well be that they had determined to go further in the deed than they had in the agreement. Yet we are now dealing with the thing that defendant mainly depends upon to show that the statement of the deed in respect to the unity of the tract and the quantum of the acreage thereof is wrong. It is possible to show that they are not at all in disagreement with each other, and that the thing vaguely referred to in the agreement, is the same thing that is definitely described in the deed.

The contention of the defendant is that he ought not to be required, through the enforcement of this agreement, to pay for the land that is occupied by the railroad. He ought to pay for the thing that he agreed to pay for—and what that thing was is now the sole inquiry. The deed, by its terms, manifests that the whole acreage was conveyed, and according to the acreage thus ascertained, he either has paid or has agreed to pay. This the deed clearly established. He knew he was taking subject to the rights of the railroad, for the deed so declares—and no declaration of that kind would have been necessary at all, if the railroad's rights did not inhere in the land he was taking through the deed. If he was only getting what the railroad had no kind of interest in, why should

the railroad's rights be mentioned? In addition to this, the railroad had been constructed and was in full operation before the agreement was made. "A purchaser who agrees to buy a certain tract of land at a certain price per acre is bound to pay at that price for the parts of the beds of roads included within the lines of the tract," *Firmstrome v. Spachter*, 150 Pa. 616; *Paul v. Carver*, 26 Pa., 223; *Cox v. Freedly*, 33 Pa., 124. "A public road, upon lots of ground which the owner had covenanted to sell and convey, is not such an incumbrance as will entitle the vendee to defalk from the amount of the purchase-money in an action of covenant upon the agreement of sale." *Patterson v. Arthur*, 9 Watts, 152. In the course of the opinion, Justice Kennedy, (page 155), says: "It may be, however, that if a person purchase land, without having seen it, upon the representation of the vendor, where its value is materially lessened by a public highway being located upon it, which circumstance is concealed; or not made known by the seller to the purchaser, the latter might obtain redress by an action, in the nature of a deceit; or, in an action brought against him for the purchase-money, might have compensation made by a deduction therefrom. But it will lie upon him, before he can claim compensation on such account, to remove by the proof of circumstances at least the presumption that he knew of the existence of the highway at the time he bought, and that the seller concealed it from or did not disclose it to him." The railroad was in operation years before the agreement was entered into; its location on the land was obvious; the defendant resided at Herminie, where the land is located, and was cognizant of its condition, and there is no allegation that the fact of its presence on the land was in any wise concealed from him by plaintiffs. "A vendee is not entitled, by virtue of the covenant implied from the words 'grant, bargain, and sell' or of general warranty, to defalk from the purchase money damages on account of a public traveled road and a railroad company's right of way across the land, which had been in use for years before his purchase." *Goodwin v. Cooper*, 4 Kulp, 239; *Eby v. Elder*, 122 Pa., 342.

The circumstance that the agreement did not mention the fact that the land was to be taken subject to the

railroad's rights therein, while the deed did so declare, does not show that the deed is wrong, for whether the article mentioned it or not, its presence on the land was known to the defendant at the time of purchase, and that knowledge as effectively precludes his claiming any abatement on account of its existence as if it had been expressly mentioned in the agreement that he was to take subject to the railroad's rights. It is a circumstance of more importance than was seemingly given to it in the taking of the testimony, that the railroad acquired its right through condemnation proceedings. On page 14 of the testimony, Mrs. Rummel, the plaintiff, testified as follows: "Q. Do you know under what title the Pennsylvania Railroad Company holds that land? A. Condemnation proceedings." M. O. Tintsman, one of the heirs, on cross examination by Mr. Rial, on pages 6 and 7, was asked the following question, and gave the following answer: "Q. It was a clear understanding, however, between yourselves and Mr. Bolton that Mr. Bolton was not purchasing the Pennsylvania right of way? A. Not the right of way, but all ground; all the ground on both sides, including underneath the right of way. The Pennsylvania never had a deed for that, simply a right of way, and the two parts spoken of in that agreement was just merely to designate what it was," etc. Ralph Tintsman, called by petitioner for cross-examination, says on page 8: "This land was there, but it was all in one, except the railroad going through; it was all sold as a whole. It didn't read as two purchases as you fellows argue." Other testimony of like import was also given. At the end of the testimony counsel for plaintiff made the following offer: "I want to make an offer of the condemnation proceedings for this land, if there is one."

No specific record was pointed out in the offer, but the case of *Mary Tintsman et al. v. S. W. Pa. Ry. Co.* at No. 127 Nov. T. 1892, seems to be the record meant. This shows that the railroad's rights were acquired by condemnation proceedings. If the widow and heirs had, by deed, conveyed in fee simple to the railroad its right of way in the land, they would have had no right to subsequently convey any interest therein or thereunder to the defendant, but, under the existing circumstances, they had such right, and they unequivocally exercised it, in

their deed to the defendant. The judgment in question had its amount fixed by reference to the contents of the deed and the accompanying survey. The entire purchase price to be paid for the land by C. H. Bolton was \$1,786. That is ascertained by the acreage mentioned in the deed, at \$110.00 per acre. At delivery of deed he paid in cash two-thirds of that sum, and gave a note for the other third, \$595.50. That note is the note now in question. It was not paid in cash at the delivery of the deed, because the widow was then still living, and it was intended that she should receive the interest accruing thereon annually during her life because of her dower in the land. The note was made payable to her for that reason—but she held it in trust for her own use during life, and then, for the use of the heirs of A. O. D. Tintsmann, her deceased husband. The evidence abundantly establishes these facts. To obtain an abatement of the amount of this note, the defendant must overthrow what the deed to him plainly shows. It undoubtedly conveys to him the space occupied by the railroad's right of way—but in subordination to those rights. He accepted the deed at its delivery, as correctly embodying the agreement with respect to the purchase of this land. He acquiesced in its legally presumed correctness for a period of six years and a half, and now seeks to overthrow it without offering to convey back whatever interest he took under the deed in the space occupied by the right of way. As was said in *Schmitz v. Roberts*, *supra*: "Where the purchase of real estate is fully closed by conveyance and payment or security of the purchase money, the law is well settled that a vendee, who does not offer to rescind and reconvey the property to his vendor, can only recover where his evidence makes a clear, strong case. When he holds fast to the property purchased, and seeks to recover back a portion of the purchase money or damages, there is a strong presumption that his deed conveyed what he purchased, and the burden rests heavily upon him to overcome this by sufficient testimony." That is this case. What clear showing will be adequate to lift this burden? "Articles of agreement for the purchase of land become merged in the conveyance and thenceforth null and void; there being no allegation of fraud or mistake in the execution of the conveyance."

Crugh v. Beelin, 1 W. & S., 83. "Deficiency in quantity is no defence to a suit on an obligation for purchase money, where there has been no actual bad faith or fraud." *Rodgers v. Oldshoffsky*, 110 Pa., 147. In *Bailey v. Snyder*, 13 S. & R., 160, Justice Gibson said: "The execution of a conveyance is the consummation of a purchase, after which the parties have no recourse to each other except for imposition." "Where the contract is executed by deed and bond or other security taken for the unpaid purchase-money, the rule is not to open a contract so far executed to allow for a deficiency of quantity, nor can there be a recovery for an excess; even if the sale be by the acre." *Agnew, C. J., in Coughenour's Admrs. v. Stauff*, 77 Pa. 191. "Where a sale of land is consummated by delivery of the deed, and payment of the purchase-money, there can be no recovery for a deficiency, in the absence of fraud or mutual mistake." *Kreiter v. Bomberger*, 82 Pa. 59.

There is no mutual mistake in this case, for the evidence shows that the plaintiffs here always understood the contract of sale to be what is embodied in the deed and note. There is also cogent evidence in the acceptance of the deed and the giving of the note and the paying on account of it, that the defendant also understood the transaction at one time, in the same way that the plaintiffs did. We look in vain in the petition and testimony for anything showing intentional wrong-doing or bad faith in the plaintiffs' mode of dealing with the defendant.

If there is anything in the nature of fraud, or that might be evidence of fraud, it must be found in some deficiency in the quantum of land to be conveyed and paid for. There is no error shown in the computation of the area comprehended within the lines of the survey—and no error shown in those lines—assuming, of course, that the outside lines have properly included within them the section through which the right of way runs. The defendant cannot well claim through this application that this section was not to be conveyed, and continue to hold fast to it, and not offer to return it. In its last analysis,—to escape the conclusion that he is seeking equity without offering to do equity,—the defendant's position must be that it was agreed that the con-

veyance was to be made just as it is, but that the defendant was not to pay for this section at the rate of \$110.00 per acre,—while he was to pay, at that rate, for the other section of the tract. He does not show any fraud, accident or mistake by omitting from the writings anything that he alleges was agreed should be inserted therein—nor does he show that any such agreement was in fact ever made. The defendant does not testify to any specific agreement had with the plaintiffs—outside of the article of agreement, and he simply now says: “according to that agreement I bought two pieces of land.” He does not account for his receiving the deed wherein the description is otherwise, and keeping it till 1913, without complaint of its incorrectness—nor for giving a note, the amount of which is computed according to the deed. He simply says he does not have the right of way because the railroad occupies it.

There are cases in which deficiency in acreage may be received as evidence of fraud—but, in itself, deficiency is not sufficient to establish fraud. “Where a sale of land is consummated by payment of the consideration and delivery of the deed, there can be no recovery for deficiency without proof of fraud or mutual mistake. Deficiency, if it be very great, though evidence of fraud, is not itself sufficient.” *Kreiter v. Bomberger*, 82 Pa. 59. After discussing the case at length, Justice Sharswood, on pages 62 and 63, says: “It follows that there was error committed by the learned Judge below in admitting and submitting to the jury the deed from *Kreiter* to *Bomberger*, as, in itself, sufficient evidence of fraud or mistake, if they should think the difference very great. If it was sufficient of itself, it was a question of law for the court, and not of fact for the jury. There was no evidence besides the deed, to show fraud in *Kreiter* or mutual mistake of the parties.” The case was reversed.

If the defendant has introduced any circumstance of fraud outside of the alleged deficiency as shown by the deed itself, we have overlooked it. But when “deficiency” is the asserted evidence of fraud, there must be a starting-point wherefrom to measure the deficiency. In view of all that is shown in the evidence, the defendant does not, by clear, precise and indubitable evidence, establish the assumed fact that the section of land cover-

ed by the right of way was erroneously included in the deed, or, if properly there, that, according to the agreement with plaintiffs, it was not to be paid for, at the rate of \$110.00 per acre. It seems rather to be assumed by the defendant that, because the railroad company has a right of way over a section of the land mentioned in the deed that the defendant could, therefore, take no title whatever to that section, and, therefore, should not be called upon to pay for it. Judging from all the evidence now before us that assumption is wrong. He ought to pay for that section if he agreed to do so. The mere fact that there is a railroad upon it and was there, to his knowledge, when the deed was made and note given, will not, of itself, relieve him of payment—whether his agreement to do so was a wise or a foolish contract. Judging by the deed and the giving of the note, he did agree to pay for it, and the other evidence is inadequate to overthrow what is thereby shown. No point has been sufficiently established wherefrom to begin any measurement of “deficiency.” On that ground, the judgment ought not to be opened.

2. But there is another ground. Lizzie L. Peters, one of the grantors, at the time of making and delivering the deed to the defendant, and at the time he delivered the note in question to the plaintiffs, was a married woman, having a husband, Sherman Peters, in full life. They both signed the deed, and she signed the customary receipt accompanying the deed. They both appeared before the justice of the peace and acknowledged the deed. But, notwithstanding these facts, the magistrate has not certified to the fact of acknowledgment, and such certificate is the only competent evidence of the fact of acknowledgement. Assuming that the law remains the same as it was before enlarged powers were conferred on married women with respect to contracting about their own property, the deed, on its face, would appear, as to her to be a nullity. The old cases show that what would constitute ratification in another, would be a legal impossibility with respect to a married woman. At common law, she had no power to convey her land, and when that power was given to her, it must be exercised in the particular form prescribed,—that is to say,—the deed must be both signed and acknowledged by the married

woman, in order that it may have any legal efficacy. The only defect in this deed is the lack of a certificate of acknowledgment. She and her husband have undertaken to cure that defect by executing a deed, dated the 22d of April, 1913, wherein the land is described, and which contains the following, to indicate the purpose of its making: "Being the same property which the grantors joined in conveying to the grantee by deed dated 4th September, 1906, recorded in Deed Book 418, page 363, the acknowledgment of which was inadvertently omitted to be certified, this conveyance being made to remedy said omission." This deed is properly executed, and is acknowledged in due form, and has been offered to the defendant as an answer to complaint of that particular defect—and it has been filed with the answer to the pending rule for defendant's use, whenever he sees fit to take it. The objection made by him to receiving it is that it is not the kind of a deed he is entitled to have,—the original deed being a general warranty deed, and this one being for "all the right, title, interest and claim" of the grantors. The proffered deed contains the operative words "grant, bargain and sell," which the statute makes to have the legal effect of a special warranty, but, because the original agreement contains the words "doth agree to grant, bargain and sell, and by good and sufficient deed, to convey," etc., the defendant claims he should have a deed of general warranty, and that this proffered deed is not a general warranty deed. This objection to it is not sufficient for two reasons:

First, the words of the agreement are satisfied by a deed with only a special warranty, and, second, because this deed, being made and acknowledged only to cure the defect arising from the lack of a certificate of acknowledgment to the original deed, makes the original deed operative as against the signers of this deed, from the beginning, and thereby makes the general warranty deed already signed and delivered by Lizzie L. Peters and her husband, to be efficacious and binding against them, according to its terms, that is to say, it gives the defendant a general warranty deed, thereby exceeding, in performance, the obligation of the executory contract. As to the first point, Fallon on Conveyance of Real Estate, sec. 174, says: "A purchaser of real

estate has no right to expect a covenant of general warranty in his deed, unless he bargains for it; an agreement that upon payment of the purchase money, the vendor 'will well and sufficiently grant, convey, and assure the said tract of land to the vendee, his heirs and assigns,' entitles the vendee only to a special warranty against the grantor and those claiming under him." "A covenant to convey in fee-simple is satisfied by a deed in fee-simple with special warranty—a general warranty is not necessary." *Espy v. Anderson*, 14 Pa., 308. "An agreement for the sale of land in which the vendor covenants that, upon the payment of the purchase-money, he will 'well and sufficiently grant, convey and assure the said tract of land to the vendee, his heirs and assigns,' there is no general warranty of title, but only a special warranty against the grantor and his heirs." *Cadwalader v. Tryon*, 37 Pa. 318; *Whitehall v. Gobwalt*, 3 Pa., 313. "The words 'grant, bargain and sell,' by statute are made to imply a covenant that the vendor has not done or suffered any act whereby the estate granted by him may be defeated. This may be said to be the only implied covenant we have in conveyance of freehold estates." *Cadwalader v. Tryon*, 37 Pa., 322 per Thompson, J. "A contract to 'sell and convey' land 'by a deed of warranty' is complied with by the delivery to and acceptance by one of three vendees of a deed of special warranty." *Payne v. Echols*, 15 Atl. 895. The defendant is, therefore, mistaken in assuming that, by virtue of anything contained in the executory agreement, he is entitled to have from the plaintiffs a general warranty deed. Such a deed was indeed given, and Lizzie L. Peters and her husband joined in its making and delivery,—but that was exceeding, and not falling short of the performance promised in the executory agreement.

As to the second point, there can be no doubt. While it is now assumed without question in what we say that a married woman is by statute not authorized to make a deed on selling her land, except when she—her husband joining—shall sign it, and also acknowledge it before an officer authorized to take acknowledgments. She has, under the law, power to make an agreement to sell. In this case, she had agreed to sell, received the purchase money or a part of it, and put the defendant in posses-

sion of the land. He was not there entirely destitute of legal right. Her deed, however, was no deed, inasmuch as the certificate of acknowledgment was lacking—although in fact she had made the acknowledgment. Undoubtedly, if the defendant were to give her the deed for that purpose, she could now go before a proper officer and make the proper acknowledgment and the deed, the proper certificate being endorsed, would be perfectly good, not only against her, but also against any creditor of hers who had, in the meantime, recovered a judgment against her. *Meade v. Clark*, 159 Pa. 159. The opportunity of proceeding in that precise form not having been afforded her by the defendant, she can accomplish the same end by a deed of confirmation properly acknowledged, and that she has done, and put it within the control of the defendant, whenever he desires to take it. A married woman cannot ratify a former deed lacking an acknowledgment in any other way than by a deed properly acknowledged—but by that means, she can ratify her former attempt to convey, and she has done so in this case. When that has been done, the transfer of title relates back to the date of the original deed—as the case cited shows. With this deed of confirmation available to him, he has no longer any right to withhold payment of the purchase money, on account of the defect, for he has all that he is entitled to.

3. The third ground for opening the judgment set up in the petition is that payments have been made on account of the judgment, while, apparently, the plaintiffs seek to collect an attorney's commission on the full amount of the judgment,—instead of only on the balance due. While that might be occasion for invoking the equitable control of the Court, it is not a reason for opening the judgment. However, plaintiffs have now expressly waived any right to collect commission on more than on the balance due—and that is all the protection the defendant needs in that respect.

An application to open a judgment is substantially a bill in equity. Looking at all the testimony taken, we are unable to see that the defendant has sustained his alleged equity to have the judgment opened and that he be allowed to defend. The rule to open judgment is, therefore, discharged at defendant's cost.

The same order is made at No. 579, February Term, 1913.

WELLS' ESTATE.

Decedent's Estate—Decedent's Debts—Claim for Nursing—Family Relationship—Presumption of Gratuitous Service—Contract—Burden of Proof.

Where a sister lives with a brother under a promise that he would give her a home, and while she is thus living with him he becomes ill, the sister is not entitled to compensation and a claim against the brother's estate will not be sustained.

In such case a statement by the brother that he wanted the sister to have something, is not sufficient to establish a contractual relation.

Where services are rendered there is an implied contract to pay for them, excepting in case of parent and child, or where a condition of family relationship is shown to have existed.

Family relationship is such living together in a common abode, that services may reasonably be expected by the recipient to be gratuitous, and may also be considered by the giver to be without the expectation of compensation.

In the Orphans' Court of Delaware County.

Exceptions to report of auditor in the estate of Moses Wells, deceased.

W. C. Alexander, for Exceptions.
Garrett E. Smedley, Contra.

March 14, 1917. The Court: The auditor has allowed a claim of Mary J. Burk against the decedent's estate, amounting to one hundred and sixty-four dollars, and this is excepted to. It appears from the auditor's report that the claimant is a sister of the decedent. She came to live with him five years before his death, under a promise that he would give her a home as long as he lived. While thus living with him, and after he became sick, she performed services for him by giving him his medicine, taking care of his room, sitting up with him at nights and attending to the commode. These services extended from February 1, 1913, to March 1, 1914, less two weeks, and again from March 24, 1914, to May 24, 1914. Evidence was submitted tending to show that during the first period these services were reasonably worth three dollars per week, and that during the second period, one dollar per week. The decedent died on

December 29, 1914. There was evidence that upon an occasion, date not given, the decedent said he wanted the claimant to have something, but this is nothing more than an expression of an intention. It is no evidence of a contract; *Gerz's Exrx. v. Demarra's Exors.*, 162 Pa., 530. The decedent by a codicil to his will, dated May 24, 1904, bequeathed to the claimant one hundred and fifty dollars, and by another codicil, dated February 17, 1913, he revoked it. It may be that the declaration that he wanted the claimant to have something was while this bequest was in force. If so, the revocation was a change of intention. There was no evidence of any demand by the claimant to the decedent for payment for these services.

It is a general rule that claims against decedents' estates should be critically scrutinized. In *Carpenter v. Hays*, 153 Pa., 432, it was said by Justice Mitchell, "Claims against a dead man's estate, which might have been made against himself, while living, are always subjects of just suspicion and our books from *Graham v. Graham*, 34 Pa., 475, to *Miller's Estate*, 136 Pa., 249, are full of expressions by this court of the necessity of strict requirement of proof and the firm control of juries in such cases." In the absence of proof of any express contract, this claim must rest upon the implied assumpsit arising upon proof of the performance of the services. The relation of the parties does not rebut the presumption, except in the case of parent and child; *Gerz's Exrx. v. Demarra's Exrs.*, *supra*. Or where a condition of family relationship is shown to have existed; *Shubart's Estate*, 154 Pa., 230; *Evans' Estate*, 60 Pa. Supr. Ct., 83. As to a family relationship, the burden of showing it was upon the decedent's estate; *Caskey v. Kineavy*, 60 Pa. Supr. Ct., 87. What is meant by family relationship as distinguished from family kinship is such a living together in a common abode, as that the services might reasonably be expected by the recipient to be rendered gratuitously, and might likewise be considered by the giver to be given without the expectation of compensation.

This is not the case of a domestic servant, where wages are presumed to have been paid as they are earned in accordance with the rule announced in *McConnell's*

Appeal, 97 Pa. 31. The claimant was a sister of the decedent, and her services were those of a nurse. Such person is not a domestic servant; Ranninger's Appeal, 118 Pa., 20; Lewis' Estate, 156 Pa., 337; Davies' Estate, 60 Pa. Supr. Ct., 360.

The pivotal question therefore is, were these services gratuitous. The pertinent facts from which this question must be solved are these. Those in her favor are, she rendered the services to an invalid brother who received them. The decedent said he wanted her to have something. The auditor who heard the witnesses has approved her claim. The facts against her are, she was an inmate of the decedent's abode, without charge, having made her home with him for several years. She was his sister. She was not paid for any of her services. She made no demand for compensation at the end of her periods of service. She made no demand of the decedent in his lifetime.

The evidence to support such claim should be clear, distinct and convincing; Winings v. Hearst, 17 Pa. Supr. Ct., 314; Coulston's Estate, 161 Pa., 151.

The conclusion is irresistible that when the claimant, making her home with her brother, without charge, performed the kindly offices for her invalid brother, which constitute the services for which the claim is now made, she did so without expectation of compensation, and that while the decedent thought that nevertheless she ought to be compensated, he did not continue to think so to the extent of carrying such thought into execution.

We therefore sustain the exception.

Opinion by Broomall, J.

CITY OF YORK v. HOLTZAPPLE. NO. 2.

Municipal Lien—Paving—Macadamizing.

Plaintiff City on the trial of *scl. fa. sur* municipal lien, offered the lien in evidence and then rested. Defendant proved that years before plaintiff had macadamized said street from curb to curb, at its own cost, and had kept the street in repair ever since. The Court gave binding instructions for the plaintiff. Held, that a motion for judgment *n. o. v.* must be refused.

The dumping and spreading of broken stones of various sizes on

a street is not such a paving as prevents a city from afterwards paving the street and charging the expense of that paving upon the abutting owners.

The fact that the city kept the street in repair is entirely consistent with the absence of purpose or intent to change an ordinary road into a city street.

Defendant contended that the lien should have been filed to the use of the contractor. Held, not to be grounds for a compulsory nonsuit.

Bonds having been issued by the city, based solely upon assessments, to be levied under the authority of the Act of May 23, 1889, P. L. 325, it became the duty of the city to make assessments and collect them in the manner prescribed by law.

The Act of June 4, 1901, P. L. 364, does not repeal the 27th section of the Act of May 23, 1889, P. L. 325.

City of York v. Holtzapple, 29 York Legal Record 134 and City of York v. Eyster, 30 York Legal Record 29, followed.

In the Court of Common Pleas of York County. No. 42, August Term, 1915. Sci. Fa. sur Municipal Lien. Motion for Judgment Non Obstante Veredicto.

For the first proceeding in this case, see City of York v. Holtzapple, 29 York Legal Record 134.

The motion to strike off the lien and quash the sci. fa. having been refused, the case came up for trial, and resulted in binding instructions for the plaintiff. This motion was then made for judgment for the defendant, n. o. v.

James G. Glessner and Cochran, Williams & Kain, for Motion.

Jno. L. Rouse and Niles & Neff, Contra.

February 19th, 1917. Ross, J.—After a scire facias sur municipal lien had been issued in this case, the defendant endeavored to have the lien stricken off and the scire facias quashed for the alleged reasons:

First. That the act entitled "An Act providing for the incorporation, regulation and government of cities of the third class," etc., etc., approved the 27th day of June, 1913, is unconstitutional, for the reason that it offends against section 1 of Article IX of the constitution of Pennsylvania.

Second. That section 10 of Article V of the said Act of Assembly is unconstitutional, "because said Act permits a municipality to cause any public street, lane, alley, or part thereof to be graded, paved, or macadamized and to provide for the payment of costs and expense

thereof either in whole or in part by the city or by the owners of the real estate bounding and abutting thereon."

The questions so raised were disposed of by this Court in our ruling filed December 20th, 1915. In our opinion then filed, we gave our reasons for overruling the motions; and required the defendant to file his affidavit of defense, (see *City of York v. Holtzapple*, 29 York Legal Record 134).

The affidavit of defense filed in answer to the scire facias admits:

1. "That the lot of ground" * * * "against which this municipal lien is filed, is located as set forth in the said claim."

2. "That the municipality, now the City of York, was incorporated into a municipal corporation known as a borough under the name, style and title of the Borough of York, by an Act of General Assembly of Pennsylvania, approved the 24th day of September, 1787, and that the said borough was incorporated into a city under the name of the City of York, by letters patent dated the 11th day of January, 1887."

The third paragraph asserts:

3. "That the said Borough of York, in or about the month of July, in the year 1874, did convert the said portion of said East Princess street, on which said lot No. 16 abuts, from its former character of a dirt street or road into a public highway or street by laying from curb to curb upon the said portion of said East Princess street a pavement composed of material commonly known as macadam, and that the cost and expense of said paving was borne and paid by the said Borough of York, and that from and since said time, to wit, in or about the month of July, in the year 1874, the said Borough of York and its successor, the said City of York, has kept the said portion of said East Princess street in condition and repair at the cost and expense of the said Borough of York, or its successor, the said City of York. This affiant further avers that by said conversion of said dirt street into a macadamized street by use of macadam paving, at its own proper cost, and expense as hereinbefore averred, the said Borough of York changed the character of said street from a dirt road to a paved street or high-

way and thereby exhausted its right and the right of its successor, the said City of York, to assess the cost of subsequent re-surfacing or re-paving of said portion of said street upon abutting property or the owners thereof, one of whom is the defendant, and that said City of York is without power to assess or file a municipal claim against the said property of this defendant for the cost, or any portion thereof, of the said re-pavement laid upon the said portion of East Princess street, upon which said property abuts, under and by virtue of the several Acts of Assembly of the Commonwealth of Pennsylvania and the ordinances of the City of York enumerated in the fourth paragraph of the municipal claim filed in this case, or under and by virtue of any other Acts of Assembly of said Commonwealth or ordinances of said city."

The other matters raised by the affidavit of defence were disposed of by this Court in our ruling and reasons therefor, in the case of "City of York v. Jacob Eyster," No. 45, August Term, 1915; which was a scire facias sur municipal lien, and was tried without a jury. (Our information is that the judgment of the Court in that case has been appealed to the Superior Court). It is reported in 30 Y. L. R. 29. Because of our prior rulings in that case and reasons filed on the motion to strike off the lien in this case, hereinbefore referred to, the only questions in issue at the trial in this case were those raised by the third paragraph of the affidavit of defence.

There was no contradiction or dispute of any of the material facts adduced by the defendant at the trial, and the Court allowed him a wide scope for his evidence to show prior paving and also to show the intention of the municipality at the time of the alleged prior paving.

The only direct or pertinent action of the municipality, which was proven or attempted to be proven, was by "Exhibit A," "Record Book EE," "being the proceedings of council of the Borough of York from April 21, 1861, to April 5, 1876," "page 460, and particularly that part of the minute of the proceedings of town council, of June 26, 1874, being on page 459, which provided as follows:"

Mr. Glessner: "I will read the ordinances and resolutions that were admitted recently, with your Honor's permission, to the jury.

"I also desire to read the minutes of July 31, 1874, and February 26, 1875, which were admitted, one of them under the recent offer, both of them under the previous offer, but they have not been read." * * *

"York, Pa., June 26, 1874. The Town Council met in regular monthly session at the Laurel Engine House at 8 P. M. Chief Burgess John M. Deitch presiding. Roll of officers and members being called Councilman M. R. Lewis proved absent. Minutes of previous meeting were read and declared approved. The following bills were presented to the Board, and were, on motion, ordered to be paid:

Franklin Naylor	\$ 2.06
Mending hose	10.00
Fauss & Smith to stone furnished	119.74
Henry Bricker to stone furnished.....	119.20
Brunhouse to stone, lime, etc.	25.00
Union Fire Co. one link of hose.....	78.00
Fred. O. Miller, to stone furnished.....	25.05
A. Reed & Bro., to mending hose.....	24.25
Henry Stock, to printing notices.....	3.00
Jesse Plank, to labor for the Borough.....	22.50
Lewis Peterman, to stone furnished.....	402.80
H. S. McHenry, to printing B. A., etc.	20.50
Union Fire Company Committee.....	5.70
Jacob Kuhns, to labor.....	7.50

Total amount granted.....\$865.30

"The following resolutions were presented and read: A petition from the citizens of the First Ward praying for the paving of the alley running between College Avenue and South Duke from Duke street to South George street was read, and on motion was referred to the Street Committee.

"A petition of the citizens of the Fifth Ward asking for the erection of a lamp post in Penn street in the alley between Philadelphia and Gay streets was, on motion, referred to the Gas Committee, with authority to act in the premises.

"A petition of citizens of the Fourth Ward praying for the erection of a number of lamp posts in various localities was, on motion, referred to the Gas Committee.

"A petition praying for the enforcement of the pav-

ing law on East King street from Queen street to the Borough Line, and also a remonstrance against the above petition was read, and on motion the petition was laid on the table.

"On motion Princess street from George street to Queen street was ordered to be piked.

"On motion Duke street from King street to Princess street was ordered to be piked.

The following resolution was offered and read:

Resolved, that the Chief Burgess be authorized to make a temporary loan of \$4000.00 to be used for the purpose of erecting an engine house for the Rescue Steam Fire Company No. 4, which building shall be erected under the control and supervision of the Fire Committee of this Board and the Trustees of said Company, it being understood that said Company shall have all deeds, papers, etc. made out in the name of the borough, and that all plans, specifications, etc. shall be laid before the Board of Councilmen for inspection and approval. On motion action on the foregoing resolution was postponed until the plans and specifications were placed before the Board of Council.

"On motion the invitation of the Laurel Fire Company to accompany them to the festival of the Vigilant Fire Company was unanimously accepted.

"On motion council adjourned.

"GEORGE E. SHERWOOD, Town Clerk."

Minute on page 482. "York, Pa., Feb. 26, 1875.

"The Town Council met in regular monthly session at the hall of the Laurel Engine House at 6.30 o'clock, Chief Burgess John M. Deitch presiding, and all the councilmen present. The minutes of previous adjourned meeting were read and approved. The Street Committee presented the following report: To the Honorable Town Council of the Borough of York. Your Street Committee take pleasure in reporting the following summary of the repairs completed by them during the year, to wit:

Number of streets piked, $21\frac{1}{2}$ squares; number of alleys piked, $\frac{3}{4}$ square; number of alleys graded and filled, 5 squares; number of alleys graded and guttered, $10\frac{1}{2}$ squares; number of streets graded and filled, $28\frac{1}{4}$ squares; number of gutters relaid and raised, and new, 14 squares; number of diamond paved with iron stone, 1

square; number of street crossings laid, 69; amount of cracked stone used for piking, 4618 $\frac{1}{4}$ perches; average cost of knacked stone, \$1.41 per perch; amount of quarried stone used for piking, 1419 $\frac{1}{2}$ perches; average cost of quarried stone, 90 cents per perch; amount of iron stone used for paving, 634 $\frac{1}{2}$ tons; average cost of iron stone, 81 cents per ton; amount of sand used for paving, etc., 10,773 bushels; average cost of sand, 2 $\frac{1}{4}$ cents per B; amount of crossing stone used, 3017 feet; average cost of crossing stone, 30 cents per foot; cost of horses, carts and wagons, \$1814.23; cost of hands under supervision of street supervisor, \$4562.26.

"Your committee would further report that in grading the lower end of Princess street it became necessary to deepen the sewer; therefore the side walls and portion of the bottom were taken out and replaced, and then covered with plank.

"All of which is respectfully submitted,

"GEORGE W. DIETZ, Committee.

"The Finance Committee made a verbal report stating that they examined the books of the treasurer and stubs of the Chief Burgess to date and find them correct."

"Then followed the Market Report, which has nothing to do with this. If the gentlemen do not care to have it read I will not read it."

In all this offer and evidence, it will be observed that there is nothing directly pertaining to the defendant's contention of "prior paving," except the clause on page 32 "On motion Princess street from South George street was ordered to be piked."

All the other evidence were facts offered with intention to show what was done in fulfillment of the order to "pike" Princess street. The witnesses on that subject, all agreed that broken lime stones were hauled upon the roadway and dumped in piles from wagons; they were then scattered evenly over the roadway with shovels, etc., and left in that condition until the passing vehicles would impact them into hard surface, until such times as the travel rendered it necessary to fill up the ruts and holes; and that was done by dumping or scraping other loose stones into the ruts and holes; or, sometimes scattering

loose stones upon the worn-out or muddy portions of the roadway. Much of the testimony admitted was for the purpose of showing what the municipality (both the borough and city) did in regard to the maintenance of the street in question.

General requirements were shown in order that the jury might infer from them the intention of the borough authorities at the time the "piking" was ordered.

It was shown that in 1903, some members of the Highway Committee in trying a street roller, (then but recently acquired by the city) repaired the roadway by plowing or digging its surface and rolling it into a smooth surface, between George and Duke streets, which was in front of defendant's property, but there was no evidence which showed or tended to show that the municipality ever directly ordered or sanctioned that work; on the contrary, it was testified that a short time afterward, the said roadway was torn up by authority of a regularly adopted ordinance of the city for the purpose of establishing a general sanitary sewer system.

A studious and careful review of all the testimony failed to convince the trial judge that any fact or combination of facts adduced, proved or tended to prove, that the municipal authorities ever intended by ordering "that Princess street from South George street to Queen street be piked," that it should be so changed by a pavement that it would thus be converted, in a legal sense, from a common road into a street; nor do the facts adduced by the defendant tend to show that the borough or city ever subsequently adopted it as such a pavement.

The Supreme Court in the case of Philadelphia v. Hafer, 38 Pa. Sup. Ct. 382, quoted by Mr. Justice Trexler, in Philadelphia v. Kerchner, 62 Pa. Superior Ct. 566, said, "The laying of water pipes in the street had no connection with the pavement, for water pipes may be laid in a street whether paved or unpaved, and are often laid in streets but little used, in order to more directly reach local centers of population. The subsequent lighting of the street had no material bearing upon the question, for unpaved streets may be properly lighted." * * *

"The fact that persons who opened the street make connection with the water and gas mains of the city were required to take out a permit, can have no weight in

determining whether the street was paved or unpaved; the city may very properly make such regulations with regard to its water and gas mains in any and all streets, whether paved or unpaved.

"None of these acts, singly or altogether following each other at varying periods, could be held to justify the inference that the municipality had adopted or acquiesced in the original surfacing of the road or any repair thereof as converting the road into a paved street."

In the case of *Philadelphia v. Eddleman*, 169 Pa. 454, Mr. Justice Mitchell, in delivering the opinion of the Supreme Court, said: "That with which we are specially concerned in the class of cases to which this belongs, is a pavement which marks the conversion in a legal sense, of a common road into a street, for that is the only kind for which, under the settled authorities from *Hammet v. Philadelphia*, 65 Pa. 146, down, an abutting property owner can be compelled to pay." * * * "The other questions which usually arise as to the kind of pavement," * * * "and who paid for it, are subordinate and are only material or relevant as bearing on the main issue of municipal recognition. They have been treated, therefore, by this Court not as questions of law but as questions of fact whose weight and bearing depend on other evidence and the circumstances of each case."

In the case of *Philadelphia v. Kerchner*, 62 Pa. Superior Ct. 565, Mr. Justice Trexler, in delivering the opinion of the Superior Court said, "Municipal adoption or acquiescence cannot be assumed. It must be proven. It is a question for the Court when the facts are undisputed." * * * "It is a question of fact in each case and the governing consideration is the nature of municipal action in regard to it." * * * "It must be recognized by the city as a paved street. Mere recognition of it as a highway is not sufficient."

In the case of *Harrisburg v. Funk*, 200 Pa. 348, the Court below, at the trial gave binding instructions for the plaintiff. The Superior Court had affirmed the ruling of the Court below and upon an appeal from that tribunal, the Supreme Court affirmed the judgment of the Superior Court.

The trial judge affirmed a point submitted by the plaintiff as follows:

"1. The dumping and spreading of broken stone of various sizes upon portions of Sixth street in the immediate vicinity and in front of the property of defendant from time to time, in the manner disclosed by the evidence in this case, was not a paving thereof under the laws of this Commonwealth." Answer: "Of course that point means, a paving such as would prevent the city afterwards paving the street and charging the expense of that paving upon the abutting owners, under the Act of Assembly, giving them the authority in proper case to do, and thus understood we affirm that point."

In the case at bar, like the last cited case, there was no evidence of any ordinance of Borough of York, or of the City of York, authorizing or adopting any formal improvement; neither was there any contract in relation thereto shown, and there was not any contention that the municipality ever exercised any statutory authority with respect to the alleged paving of the street, prior to the time of laying the pavement for which this assessment was made and which the City of York is now trying to enforce.

The entire absence of formal municipal action is strong presumptive evidence of lack of municipal intent. It was incumbent upon the municipality to keep the thoroughfare, called Princess street, in repair, and there was nothing in the evidence of the trial which indicated that anything else was done. According to the opinion of the Supreme Court in the last cited case, its discharge of the duty of keeping the roadway in repair, is entirely consistent with the absence of purpose or intent to change an ordinary road into a city street.

If the evidence would have shown that any such substantial, hard, smooth surface, firm and enduring first pavement had been constructed by authority of the municipality in 1874, or any time prior to the construction of the present pavement, such as was described by the evidence was constructed in the case of Pottsville v. Jones, 63 Pa. Superior Court 180; or in the case of Philadelphia v. Edmonds, 64 Pa. Superior Court 469, with proper evidence tending to show subsequent adoption or acquiescence by the municipality, the trial judge might have been justified in leaving the facts to the jury for it to infer the intention of the city; but in the case at bar,

the remoteness and uncertainty of the action of the Town Council in 1874, and the unstable character of the work on Princess street between South George and Queen street, which was done in accordance with that action of Council, together with the lack of evidence as to who performed the "piking," whether the street commissioner, the street or road supervisor, or a highway committee, rendered all the other evidence as to subsequent acts of the city useless in determining whether or not that act was intended to change the road into an improved paved street in a legal sense, or whether the subsequent acts of the city had amounted to such subsequent adoption or acquiescence as would change the highway into an improved paved city street in a legal sense.

The trial judge, therefore, exercising his right, affirmed the point submitted by the plaintiff, at the close of the testimony, for binding instructions and instructed the jury to return a verdict for the plaintiff.

Although a motion for a new trial was made by the defendant after the verdict had been rendered, it was formally withdrawn with the consent of the president judge at the time of the argument; no alleged errors of the ruling of the trial judge were argued, other than the binding instructions for the plaintiff; it is proper to refer to some of the exceptions to the ruling of the Court at the time of the trial.

This action was commenced by issuing a scire facias on a municipal lien. The first resistance by the defendant was made by filing a petition asking the Court to quash the scire facias and strike off the lien for the reasons set forth in the petition. The Court, after argument pro et con, refused to quash or strike off.* The defendant then filed an affidavit of defense which raised the same questions which had been raised by the petition to strike off, and in addition thereto the question of prior pavement was raised. At the trial the plaintiff offered the municipal lien and the record thereof in evidence. The Court overruling an objection thereto, admitted the offer and allowed the lien to be read to the jury. The plaintiff then rested its case.

The defendant moved for compulsory non-suit, which was overruled.

The defendant's seventh point was a request for

binding instructions based upon the alleged insufficiency of the plaintiff's case, in relying upon the lien itself.

Under the authority of *Philadelphia v. McPherson*, 140 Pa. 5; *Erie City v. Willis*, 26 Pa. Superior Ct. 459; *Allentown v. Ackerman*, 37 Pa. Superior Ct. 363; *City of York v. Beitzel*, 41 Pa. Superior Ct. 195, and the defendant's admissions in his affidavit of defence, the point was refused.

The lien was drawn and filed in accordance with the requirements of the several statutes and ordinances which authorize it, and they were all duly referred to in the lien, and the question of its regularity or sufficiency was conceded by the defendant's prior admissions in his motion to strike off.

The contention of defendant that the lien should have been filed to the use of the Standard Bitulithic Company, is not an available defence in this case, as we decided when that contention was first raised in the motion to strike off.

In the case of *City of York v. Jacob Eyster*, hereinbefore referred to, the same contention was made, and we repeat here what we said in that case, as applicable to the contention in this case.

"It was argued that because the city entered into a contract with the Standard Bitulithic Company, which was the successful bidder for furnishing work and materials in the construction of the pavement which was the municipal improvement for which assessments on the abutting property holders were made, agreeing that it would take assessment bonds in payment of part of the work and material furnished, it was thereby brought within that class of creditors or contractors, which are comprehended by the Act of 1901, P. L. 364, and therefore the municipal lien should have been filed for the use of the contractor which would have required said contractor to give thirty days' notice of its intention to file a lien, and such notice not having been given by the contractor, this case would necessarily fall within the ruling of the Superior Court in "*York City v. Miller*, 60 Pa. Sup. Ct. 407." We do not agree with that contention. In that case, the lien was actually filed by the city for Kraft the contractor, in compliance with an ordinance directing that a bill for the work, etc., done and furnished

should be presented, and 'if said bill with penalty shall not be paid at the expiration of ten days after notice so to do, the City Solicitor shall bring action at law or file a lien therefor to the use of the contractor,' * * * "and said contractor shall rely upon said suit or lien."

"In the case at bar there was no requirement by either ordinance or statute that the lien be filed for the use of the contractor. When the ordinance was drawn, and the contract was made under which Princess street was paved and the assessments were made for the payment of that pavement, it is obvious that the proceeding was in conformity with and by virtue of the 27th section of Article XV of the Act approved May 23rd, 1889, P. L. 325-6, which gave the city the 'right to issue improvement bonds, based solely upon the assessments.' But, the counsel for defendant further argue, that the act approved June 4th, 1901 P. L. 364, contains a general repealing clause, on pages 402 and 403, which renders the Act of 1889 and the ordinance based thereon void; this view, we think, is erroneous. The clause referred to reads as follows: "And all other acts or parts of acts of Assembly of this Commonwealth, general, special or local, appertaining to the subject matter covered by this Act, be and the same are hereby repealed." In view of section 42 which appears on page 379, and the division of the section, which appears on page 386, of the pamphlet laws, both of which are limited repealing clauses, we are of the opinion that the Act of 1901 does not repeal the said 27th Section of the Act of 1889.

"The lien as filed does not bring it under the 9th Section of the Act of 1901, P. L. 364; in our opinion it is entirely compatible with the provisions of the 4th clause of that act, which gives the municipality the right to file liens for pavements in its own name. It cannot be contended in this case, that the contractor was to be paid by "Assessment bills;" consequently there is nothing in the Act of 1901 requiring the city to make the contractor a party claimant in the lien. He stands in the position of a successful bidder for a municipal contract to do certain work in a certain specified way with certain specified materials, within a certain specified time and for a certain specified price, which was to be paid to him according to the contract, and under that contract the

city had a duty to make assessments and collect them in the manner prescribed by law. As a business proposition bonds were given for the payment of part of the consideration which induced the contractor to bid for the work and material to be furnished in the municipal improvement. The bonds were issued by authority of law, and it is the moral and legal duty of the city to see that the assessments for the benefits, on which the bonds were based, should be collected; and if it is remiss in the collection of those assessments, the contractor should not lose the money which is due to it under the contract which it performed; *Gable v. Altoona*, 200 Pa. 15; *Noland v. Reading*, 235 Pa. 357; *O'Hara v. Scranton*, 205 Pa. 143; *Bank of Scranton v. Scranton*, 208 Pa. 383."

In that case, as well as in our opinion filed in disposing of the motion to strike off the lien, raised in this case, we set forth our reasons, upon which we based our rulings in rejecting the other offers made by the defendant at the trial.

It is not now deemed necessary to repeat them in discussing our refusal of the points submitted by defendant at this trial, because, having decided that the evidence was not sufficient to submit to the jury, it was unnecessary to submit any of the points for their consideration, and counsel for defendant having insisted that each of them be answered in writing, they were refused, not as denial of their legal soundness under proper circumstances, but as immaterial at the time in this case.

Motion for judgment non obstante veredicto is refused, and judgment is directed to be entered on the verdict. An exception is sealed for the defendant.

* See *City of York v. Holtzapple*, 29 York Legal Record 134.

REINHARD v. EGYPT SILK MILL ET AL.

Workmen's Compensation—Scope of Employment—Act of June 2, 1915, P. L. 736.

An employe, who is injured "in the furtherance of the business or affairs of his employer," whether as a volunteer in that particular branch of it, or even when acting beyond the scope of his original employment, is under the 301st section of the Act of June 2, 1915, P. L. 736, entitled to compensation.

In the Court of Common Pleas of Lehigh County. No. 1 January Term, 1917. Russell E. Reinhard v. Egypt Silk Mill and Globe Indemnity Company, Insurance Carrier. Appeal from Workmen's Compensation Board. Appeal dismissed.

Ira T. Erdman, for Claimant.

George W. Aubrey, for Insurance Carrier.

Groman, P. J., March 19, 1917. The plaintiff, Russell E. Reinhard, was employed by the defendant company in the twisting department of its mill located at Egypt, Lehigh County, Pennsylvania; his duties required him to hand in silk into said department. On July 29, 1916, while so employed, plaintiff was ordered by his foreman to assist in ruling off silk on the floor below on which were located picking machines operated by the defendant company; the operating of such machines was not, however, in the line of duty required by defendant from the plaintiff, but the plaintiff's presence was required on this floor and in the same room by the nature of the duties he was directed to perform. While on the lower floor, plaintiff voluntarily and without the direction of any one, took charge of a picking machine operated by an older boy who had temporarily left the room; while so engaged he suffered injuries necessitating the amputation of four fingers of his right hand. A claim for compensation was filed under the provisions of the Act of June 2, 1915, P. L. 736. The referee awarded the claimant five dollars a week for one hundred and seventy-five weeks, dating from August 12, 1916, together with a bill for medical, surgical and hospital services for fourteen days following the accident, not to exceed seventy-five dollars; upon appeal to Workmen's Compensation Board, the award was affirmed. The insurer company thereupon appealed to this court, contending first, that at the time the injuries were suffered by the plaintiff, he was not acting within the scope of his employment, and second, that plaintiff was a volunteer.

The Act of June 2, 1915, P. L. 736 "has broadened the scope of many words and phrases beyond their well known meaning," seems to scatter precedent to the winds, and compels those who have practiced law for

some time to divest themselves of habits of thought and reasoning relative to the legal responsibilities now existing between employer and employee; we are now almost required to lay a new foundation, erect another superstructure, and are called upon to blaze the way into a new and almost untraveled region. The attention of the court was not called to any decisions of a higher court of this state relative to the questions herein raised; we will, therefore, start out with such provisions as the Act of 1915 may have relative to the liability of an employer to his employee, being as follows:

“When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employe, by an accident, in the course of his employment, shall be made in all cases, by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article; provided that no compensation shall be made when the injury or death be intentionally self-inflicted, but the burden of proof of such fact shall be upon the employer.

“The terms ‘injury’ and ‘personal injury’ as used in this act shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom; and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such violence and its resultant effects, and occurring within three hundred weeks after the accident. The term ‘injury by an accident in the course of his employment,’ as used in this article, shall not include any injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer’s premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer’s business or affairs thereon, sustained by the employe, who, though not so engaged, is

injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment."

The court finds that plaintiff was engaged "in the furtherance of the business or affairs of his employer," whether as a volunteer in that particular branch of it, or even as acting beyond the scope of his original employment, is under the above section of the act immaterial. The word "furtherance" as used in the act applies to every detail necessary for the advancement of the business of the employer, and in which the employe was engaged at the time of the accident. The employe's presence was required on the floor where the accident occurred by reason of the nature of his employment. The plaintiff was thus within the provisions of the 301st section of the Act of June 2, 1915, and entitled to recover.

Now March 19, 1917, the decision of the Workmen's Compensation Board is affirmed, and the appeal dismissed.

FINANCE AND GUARANTY COMPANY v. WEST AUBURN CREAMERY CO.

Foreign Corporations—Doing Business Within State—Art. 16, Sec. 5, of Constitution—Act of April 22, 1874, P. L. 108.

The purchase, by a foreign corporation not registered in this State, of book accounts covering a number of transactions with different parties, the collection of which extended over a period of several months, more or less permanent and in line of its corporate activities, the corporation at all times exercising complete control over the transactions within the State through its designated agents within the State to carry on these corporate activities, is doing business within this State and is in violation of Article 16, section 5, of the Constitution of Pennsylvania and the Act of April 22, 1874, P. L. 108.

In the Court of Common Pleas of Lehigh County. No. 102 September Term, 1915, Finance and Guaranty Company v. West Auburn Creamery Company. Assumpsit. Motion to take off Non-Suit. Motion overruled.

Sam'l J. Kistler and Chas. F. DaCosta, for Plaintiff.
George W. Aubrey, for Defendant.

Groman, P. J., March 19, 1917. The plaintiff, a foreign corporation with its principal office at Baltimore, Maryland, on December 13, 1913, entered into an agreement with the defendant, West Auburn Creamery Company, a domestic corporation, with its place of business at Allentown, Pennsylvania, whereby the defendant company sold, assigned and set over to the plaintiff company, its successors and assigns, all its right, title and interest to and in a number of open accounts and contracts fully set forth in said agreement. Under the terms of the agreement collections were to be made, and paid over to the plaintiff; the West Auburn Creamery Company, the defendant, and V. G. Tice of Allentown, Pennsylvania, were designated as agents to do so. The plaintiff avers that the defendant is indebted to it in the sum of \$557.53 for failure to comply with certain terms of the agreement; suit was brought to recover said amount. It is admitted that the plaintiff corporation was not registered in the State of Pennsylvania, and at the trial the case was submitted as to whether plaintiff was doing business in Pennsylvania as a foreign corporation in violation of the Act of April 22, 1874.

Article XVI, Section 5 of the Constitution of Pennsylvania provides that "no foreign corporation shall do business in this state without having one or more known places of business and an authorized agent or agents in the same, upon whom processes may be served." The Act of April 22, 1874, was passed to make the constitutional provision effectual, and remained in force until the Act of June 8, 1911, was passed designating the Secretary of the Commonwealth as the agent for all foreign corporations. The question whether or not the company is doing business within the State of Pennsylvania is one of fact not necessarily dependent solely on single acts or on the effect of single acts, but on the effect of all combined acts which they are performing here: *Commonwealth v. Wilkes-Barre and Hazleton Railroad Company*, 251 Pa. St., Page 10. A single act may or may not constitute "doing business." *Thompson on Corporations*, 6670 et seq. It has also been held that where a foreign corporation appointed a local agent in this state to whom it consigned goods to be sold on commission, the company employed a portion of its capital within the Common-

wealth, that its property shipped here was liable to be sold or returned as it might determine, that then it was doing business in this Commonwealth: *The Milsom Rendering and Fertilizer Company v. Kelly*, 10 Pa. Sup. Ct., Page 565. In *Osborne v. Shilling*, 11 American and English Annotated Cases, Page 322, it was held that a foreign corporation maintaining an agency in another state was doing business therein, so also, is the ownership of goods in another state on the ground that the consignee becomes the agent for the company.

It thus seems that the tests to be applied are: did the corporation act within the scope of its corporate powers; was part of its capital invested in the state for a more or less indeterminate period; was it a single transaction only, or did it contemplate a series of acts extending over a period of time; did the corporation have an agent or agents in the state representing it for the purpose of carrying on the business in which it was engaged?

That plaintiff acted within the scope of its corporate powers is conceded, and cannot be the subject of argument. That plaintiff invested part of its capital in Pennsylvania can be found by the facts as disclosed by the pleadings. The purchase of book accounts covering a number of transactions with different parties, the collection of which extended over the period of several months, was more or less permanent and was in the line of its corporate activities; the plaintiff at all times exercising complete control over the transaction within the state through its designated and appointed agents within the state to carry on its corporate activities in the state after acquiring certain accounts by purchase. The act of the agent coming into the state and soliciting business for the foreign corporation is not here in question; what we are now concerned in is the situation of the plaintiff after the execution of the agreement, and the acts of plaintiff in carrying out the terms of the agreement, indicating whether it was "doing business in the state" or not. The plaintiff transacted at least a part of the business within the state, had part of its capital invested, and had personal property therein subject to legal process. In *Thompson on Corporations* (White's Supplement 1915), 6671-6672, we find the following language: "A foreign corporation is 'doing business' within a

particular state when it transacts therein some substantial part of its ordinary business which is continuous in character, as distinguished from merely casual or occasional transactions."

We, therefore, reach the conclusion that plaintiff corporation was "doing business" in the state which required it to register therein.

Now March 19, 1917, motion to take off non-suit overruled.

COMMONWEALTH v. ROLL ET AL.

Criminal Law—Grand Jury—Costs.

The grand jury has no power to place costs on a person who is not marked on the indictment as the prosecutor or who has not appeared before it.

In the Court of Quarter Sessions of Lehigh County. Nos. 45, 46 and 47 January Sessions, 1917. Commonwealth of Pennsylvania v. Samuel Roll, et al. Rule to show cause why the findings of the Grand Jury, placing the costs on Samuel Siegel, should not be set aside. Rule absolute.

Warren K. Miller, District Attorney, for Commonwealth.

Butz & Rupp, for Petitioner.

Groman, P. J., March 19, 1917. B. Levin was the prosecutor in the above prosecution, and his name was so endorsed on the bill of indictment. The indictment was submitted to the Grand Jury and the following return endorsed thereon: "January 2, 1917, Not a True Bill. Samuel Siegel for costs. Solomon F. Rupp, Foreman." Mr. Siegel was not a witness before the Grand Jury and consequently was not heard. To impose the costs on the real prosecutor, the party who appeared to have been the real prosecutor should have been brought before the Grand Jury as a witness by subpoena if necessary. If Samuel Siegel had so appeared before the Grand Jury, had been sworn, had testified, and then had the costs imposed on him, the court would not be inclined

to grant the relief prayed for; such was not, however, the case. An opinion filed in the Court of Quarter sessions of Schuylkill County, in *Commonwealth v. Madden*, 1 District Reports, Page 129 clearly expresses the views held by this court.

Now March 19, 1917, rule to show cause why the findings of the Grand Jury, placing the costs on Samuel Siegel should not be set aside, made absolute.

TROXELL v. TROXELL.

Divorce—Libel—Causes for Divorce.

Divorce is of statutory origin, and the libel should contain the language of the statute.

In an action by a wife for divorce, an allegation of personal indignities is insufficient without the allegation that these forced the libellant to withdraw from respondent's house and family.

In the Court of Common Pleas of Lehigh County. No. 87 October Term, 1916. *Estella M. Troxell v. Allen J. F. Troxell*.

Groman, P. J., April 2, 1917. The Act of March 13, 1815, provides two distinct causes of divorce as follows: "When any husband shall have, by cruel and barbarous treatment, endangered his wife's life," or "offered such indignities to her person, as to render her condition intolerable and life burthensome, and thereby forced her to withdraw from his house and family." The libel sets forth the following cause: "By cruel and barbarous treatment and indignities to her person rendered her condition intolerable and life burdensome." Divorce is of statutory origin and the libel should contain the language of the statute: *Sites v. Sites*, 23 Pa. C. C., 439. The libel fails to allege that the indignities offered to her person forced her to withdraw from respondent's house and family. The libel is thus defective and alleges no ground for divorce provided for by the Act; where a libel is defective, it is the duty of the Court to refuse a decree: *Dunkel v. Dunkel*, 11 Pa. C. C., 297. The following authorities throw additional light on the averments to be contained in libels for divorce as this court views the question involved: *Edwards v. Edwards*, 9 Philadelphia, 617; *Spengler v. Spengler*, 15 W. N. C., 437; *Schlichter v. Schlichter*, 10 Philadelphia, 11.

Now April 2, 1917, Decree in divorce refused.

BANK OF HAMILTON v. LEADER PUBLISHING CO.*Promissory Notes—Alteration—Evidence—Burden of Proof.*

The burden of explaining interlineations and erasures in a promissory note is on the plaintiff, and until these are explained, the note cannot be introduced in evidence.

In the Court of Common Pleas of Lehigh County. No. 122 April Term, 1916. Bank of Hamilton v. Leader Publishing Company. Motion for New Trial. Motion dismissed.

Fred G. W. Runk, for Plaintiff.
Dewalt & Reno, for Defendant.

Groman, P. J., April 2, 1917. The plaintiff sought to recover from the defendant on a certain instrument dated October 9, 1913, wherein defendant agreed to pay to The Bradley-Garretson Company, Limited, of Brantford, Ontario, the sum of One Hundred Sixty-two and 50-100 Dollars in monthly installments of Twelve and 50-100 Dollars, payable on the fifteenth day of each month, commencing December, 1913. On October 23, 1913, the Bradley-Garretson Company, Limited, endorsed the said instrument as follows: "Pay to the order of the Bank of Hamilton, Brantford, Ontario," who thus became the owner and holder of the written instrument or as designated by the plaintiff note for value. The note in question was partly printed and partly written. At the trial the defendant objected to the introduction of the note unless and until the written portions of the note were explained. An examination of the note disclosed the fact that a certain printed word was erased and written words inserted. Different notations also appear on the face of the note in a different hand writing and in different colors of pen or pencil. The Court sustained the objection. The jury rendered a verdict for the defendant. A motion for a new trial was entered. The motion raises but one question: whether the Court erred in sustaining the hereinbefore referred to objection made by counsel for defendant. The Court is not convinced that error was committed. In *Cornog v. Wilson*, 231 Pa. St., Page 281 (1911) in an opinion delivered by Chief Justice Fell, April 10, 1911, we find the following language used by the Supreme Court: "When it clearly appears on the face

of a writing that it has been altered in a material point, it is incumbent on the party producing it to account for the alteration, and until this is done it is not admissible in evidence. This rule is more stringent when applied to negotiable paper than to other written instruments, and in relation to it there is no presumption of innocence and the burden of explaining any apparent material alteration is cast on the holder thereof: *Simpson v. Stackhouse*, 9 Pa. 186; *Neff v. Horner*, 63 Pa. 327; *Nagle's Est.*, 134 Pa. 31; *Hartley v. Corboy*, 150 Pa. 23; *Citizens' National Bank v. Williams*, 174 Pa. 66; 2 *Daniel on Negotiable Instruments*, sec. 1417. In *Nagle's Est.*, supra, it was said, "As a general rule, the law presumes in favor of innocence, but this presumption does not extend to the alteration of negotiable instruments," and in *Bank v. Williams*, "The tendency of all our recent decisions is to hold parties more strictly responsible for alterations of any kind, particularly in the case of negotiable instruments."

The burden of explaining the interlineations and erasures was on the plaintiff, and failing to do so, the note could not be received in evidence. For reasons hereinbefore referred to, motion for a new trial will have to be dismissed.

Now April 2, 1917, motion for a new trial dismissed.

COMMONWEALTH v. SCHADLER.

Summary Conviction—Doubtful Legal Question—Boroughs—Railroad Crossings.

An appeal will be allowed in a summary conviction, where a doubtful legal question is involved.

A borough has no power to limit the time upon which the blocking of a street-crossing by a railroad train would subject the trainmen to a penalty.

In the Court of Quarter Sessions of Lehigh County. *Commonwealth of Pennsylvania v. Robert Schadler. Summary Conviction. Rule for Appeal. Rule Absolute.*

Horace W. Schantz, for Commonwealth.
Dewalt & Reno, for Defendant, Petitioner.

Groman, P. J., March 19, 1917. The courts through-

out the state are not inclined to encourage appeals from summary convictions, and will not allow the same unless for cause shown: *McGuire v. Shenandoah*, 109 Pa. St., Page 613; *Commonwealth v. Eichenberg*, 140 Pa. St., Page 158; *Commonwealth v. Yocum*, 29 Pa. Sup. Ct., Page 428. In *Thompson v. Preston*, 5 Pa. Sup. Ct., Page 154, the rule is stated as follows: "Ordinarily an appeal ought not to be permitted, if the party desiring it has had an opportunity fully and fairly to present his case before the magistrate unless a doubtful legal question is involved or there is something to indicate oppression, corruption or disregard of law on the part of the magistrate, or after-discovered evidence, which would justify a new trial."

The defendant herein, however, alleges that the Borough has no power or authority under the law of the state to pass the ordinance under which this prosecution was brought; this proposition involves a doubtful legal question. The courts of Allegheny County in the case of *Commonwealth v. Ward*, in an opinion filed by Kennedy, J., July 3, 1914, passed upon an ordinance almost similar to the one in question on an appeal from a penalty imposed for violating the ordinance of the Borough of Duquesne. This ordinance forbade any railroad employee from obstructing a public crossing for a longer period than five minutes at one time. In that case the testimony disclosed the fact that the crossing was blocked for upwards of forty minutes at 4:00 A. M., which the Court found was an unreasonable length of time; the Court, however, held that in view of the decision in the *Pennsylvania Railroad Company* case, 213 Pa. St., Page 373 (1906), the Borough had no power to limit the time upon which the blocking of the street crossing by a railroad train would subject the trainmen to a penalty. Such being the opinion of the Court of Common Pleas of Allegheny County, and the opinion of the Supreme Court of the State of Pennsylvania, the appeal will have to be allowed.

Now March 19, 1917, rule for appeal in the above case made absolute.

ESTATE OF WILLIAM M'CANN, DECEASED.

W died December 18, 1881, leaving a will wherein he bequeathed two mortgages, \$15,000 and \$7,600 respectively, unto his daughter, S, during the term of her natural life, and after her death to her child or children, if any, and in case she should die without issue, to the children of a step-son J.

An auditor was appointed to make distribution of the balance shown by the account filed by the Executors of said Testator, who, after hearing testimony, awarded \$15,000 to the Executors in trust to pay the interest unto the said daughter, S, and the \$7,600 mortgage was awarded to the said daughter, S, as the owner of it, as disclosed by the testimony. The said daughter, S, died June 16, 1916, leaving no issue, whereby the trust was terminated. The said stepson, J, left to survive him an only child, H, who is the exceptant.

The exceptant claims that the accountant should be surcharged with the \$7,600 awarded to S. Held, that the testimony before the Auditor clearly established that the testator, W, recognized that \$7,600 of the purchase money of a certain farm which belonged to the wife of W, and the mother of S, belonged to S, and that the decree confirming the account and the distributions awarded by the Auditor, became final March 3, 1884, and is res adjudicata.

An account confirmed can only be reviewed as a matter of right for error of law apparent on the face of the record, or for new matter which has arisen since the decree; or as a matter of grace for new proof discovered after the decree, which proof could not possibly have been used at the time the decree was made.

Exceptant having attained her majority in 1893, could not lie by until after the death of all the executors, of whom her father was one, and delay asserting the rights she may have had, to have the confirmation and distribution opened by Bill of Review.

In the Orphans' Court of Montgomery County. No. 22, February Term, 1917.

Evans, High, Dettra & Swartz, Attorneys for Accountants.

Morris B. Saul and Franklin L. Wright, Attorneys for Exceptant.

Opinion by Solly, P. J. William McCann, a resident of the Borough of Norristown, died on the 18th day of December, 1881, having made his last will and testament in writing, bearing date the 22nd day of February, 1881, duly probated the 9th day of January, 1882, upon which letters testamentary were granted to Mary Norris Walker, James G. Wells and Charles Hunsicker, who were appointed Executors.

The will contains the following clause:

"Item. I give and bequeath all the interest I have in two certain mortgages and bonds, given to me by A. S. Claffin and Henry S. Parmalee on a farm of two hundred

and thirty-six acres of land in Norriton Township, one of said mortgages is for fifteen thousand dollars and the other is for seven thousand, six hundred dollars, unto my daughter Mary Norris Walker, for and during the term of her natural life, and after her death, to her child or children should she die leaving any at her death, and in case she should die without leaving any issue, then I give and bequeath the said principal sums to the children of my step-son, James G. Wells, living at the death of my daughter, Mary Norris Walker, or the issue of a deceased child or children living at the death of my daughter, so that the issue of any deceased child shall take the parent's share, said principal sums to be divided to and amongst said children and grandchildren of said James G. Wells, share and share alike, as aforesaid."

The account of the Executors having been filed in the office of the Register of Wills, the late Judge Weand was appointed Auditor, to make distribution of the balance remaining in their hands. His report was filed December 15, 1883, to which an exception was filed. On March 3, 1884, the exception was dismissed and the report confirmed by the Court, for the reasons given by the Auditor.

In the distribution made by the Auditor, schedule of which forms a part of the report, \$15,000 was awarded to "the Executors in trust to pay interest to Mary Norris Walker and principal as provided by the will, mortgage on Claffin farm, \$2000, paid on acct. which is also to be invested same as mortgage."

Mary Norris Scarlett, formerly Walker, the surviving Executor, and the life beneficiary of the said \$15,000, died on the 16th day of June, 1916, leaving no issue. Her death terminated the trust. She having died without issue, the principal, by the provision of the will, is bequeathed to the children of James G. Wells, living at the death of Mrs. Scarlett. The only child of said Wells is Hepsey Norris Wells, who is of full age.

The account was filed the 5th day of January, 1917, showing the following balances:

Principal	\$14,675.50
Income	325.58

Ten thousand dollars of principal is invested in a mortgage on premises at Bridgewater, Delaware County,

Pa., and \$3200 in a mortgage on premises, 843 South 58th Street, in the City of Philadelphia.

Hepsey Norris Wells filed an exception to the account. She claims that the accountant has failed to charge herself with the sum of \$7000 or with a mortgage on the Claflin farm, in Norriton Township, in the amount of \$7600, the principal of which she claims, was bequeathed, upon the death of Mary Norris Walker Scarlett, to her as the only child and issue of James G. Wells.

This \$7600, in the shape of a mortgage on the Claflin farm, was awarded by the Auditor to Mary Norris Walker, as the owner of it. The record of the testimony taken before the Auditor discloses that Mrs. Walker claimed that the \$7600 was her share of the farm which she and her father sold to Claflin and Parmalee. Charles Hunsicker, Esq., was counsel for McCann at the time he sold and conveyed the farm. He testified that the price at which it was sold made the share of Mrs. Walker amount to \$7600. McCann transacted the business for himself and Mrs. Walker. When the title papers were passed McCann stated to Mr. Hunsicker and at interviews subsequently, that \$7600 of the purchase money belonged to Mrs. Walker, that he took the two mortgages, one of \$15,000 and the other of \$7600, so as to designate by the smaller one the amount that was due Mrs. Walker. He took both mortgages in his own name because he was tenant for life as the surviving husband of Hepsey Norris Wells, and entitled to interest on both mortgages. McCann, after his wife's death, purchased the reversionary interest of all his wife's children by her first husband before he made sale of the farm, but he did not purchase the interest of his daughter, Mary Norris Walker. The Auditor found as follows:

"Wm. McCann married Hepsey Norris Wells and had by her one child, Mary Norris, now intermarried with J. B. Walker. Mrs. McCann was the owner in her own right of a farm in Montgomery County and dying seized thereof, Wm. McCann became tenant by the courtesy—He bought all the shares of Mrs. McCann's children by a former marriage, in the farms and thus he and his daughter, Mrs. Walker, were the owners thereof he however having a life interest in the whole. The farm was sold by Mr. McCann, Mrs. Walker joining in the

deed. Her interest therein was fixed at \$7600 and Mr. McCann in completing the transaction, took two mortgages of \$15,000 and \$7600 respectively, intending the latter to represent his daughter's share, both mortgages being taken in his own name—In his will he disposed of these securities by giving Mrs. Walker the interest or income and in case of her death upon certain contingencies, then over, &c. Mrs. Walker now claims her \$7600 absolutely, not as legatee, but as rightful owner and is willing to take the \$7600 mortgage as cash. It is therefore decreed to her. She is the only child of Wm. McCann and after payment of all legacies, is entitled to the surplus or remainder of his estate. Since the death of Mr. McCann the owner of the mortgaged premises has paid six hundred dollars and some interest on account of the \$7600 mortgage. These sums also belong to Mrs. Walker, leaving due on her mortgage \$7000."

It is difficult to see how the exception to the account can be sustained, and the accountant surcharged with \$7600. William McCann, the testator, gave and bequeathed all his interest in two mortgages, one of \$15,000 and the other of \$7600, given and executed by Claffin and Parmalee, on a farm in Norriton Township, this county, to his daughter, Mary Norris Walker, for her life. After her death he bequeathed the principal of the mortgages to her child or children and in case she died without leaving issue, to the children of his step-son, James G. Wells, living at the death of said life beneficiary. In 1883 the account of Mary Norris Walker, James G. Wells and Charles Hunsicker, the Executors, was filed and adjudicated by the Orphans' Court of this county. The balance in their hands was awarded and paid to the distributees. Mrs. Walker claimed the \$7600 mortgage as her property, and showed that the testator had no interest in it to bequeath. Her contention was sustained by the auditor who heard testimony concerning the sale of the farm, and the ownership of Mrs. Walker therein at the time of the sale. It was clearly established that the testator recognized that \$7600 of the purchase money of the farm belonged to Mrs. Walker. She was accordingly awarded the mortgage as the rightful owner. The other mortgage of \$15,000 was awarded to the executors in trust to pay the interest to Mrs. Walker and at her death to pay the

principal as provided in the will. The decree confirming the account and the distributions awarded became final March 3, 1884, and is *res adjudicata*.

The account now before the court is stated to be that of Mrs. Walker (who intermarried with one Scarlett), as surviving executrix, and is filed by the administrators of her estate. This is misleading. It is in fact her account of the administration of the \$15,000 trust, and has no relation to the administration of the estate of William McCann. That was completed in 1884. The account will, therefore, be treated what it is in fact, namely, the accounting of the trust of \$15,000.

The exceptant cannot, in the audit of the account of the trustee, attack the decree of the court in 1884, and unappealed from, wherein the estate of William McCann which had been administered and brought in for distribution, was awarded to the persons found entitled to it. The proceeding here is a collateral one. The remedy of the exceptant, if she has any, is to have the account of the executors reviewed, the decree of confirmation opened, and the distribution or award made to Mrs. Walker set aside. It is extremely doubtful, however, whether she could obtain a review of the account and the reopening of the adjudication at this late day. It is well settled that an account confirmed can only be reviewed as a matter of right for error of law apparent on the face of the record, or for new matter which has arisen since the decree; or as a matter of grace for new proof discovered after the decree, which proof could not possibly have been used at the time the decree was made. *Milligan's Appeal*, 82 Pa. 395; *Scott's Appeal*, 112 Pa. 427; *Priestley's Appeal*, 127 Pa. 420; *Bailey's Estate*, 208 Pa. 594. After actual payment in accordance with a decree of the court a bill of review is too late. *Keim's Appeal*, 125 Pa. 486.

During her infancy the exceptant was not concluded, perhaps, by the decree confirming the executor's account and awarding distribution of the estate, but after she attained her majority in 1893, she could not lie by and delay asserting the right she may have had to have the confirmation and distribution opened by bill of review. She has waited until after the death of all the executors, of whom her father was one, and then she does not attack their account and the decree of the court directly but

seeks to set aside the final decree by claiming the estate of the deceased surviving trustee should be surcharged with something which never came into the hands of the trustees. It is horn book law and needs no citation of authorities (many will be found collated in 14 P. & L. Dig. of Decisions, pl. 24573) that where the Orphans' Court acts within its jurisdiction, its decrees stand upon the same footing as judgments and decrees of other courts of record and cannot be collaterally impeached. Until a rehearing or a review be allowed, confirmation of an account and distribution by the court is conclusive on all the world. *Pleasanton's Estate*, 232 Pa. 321.

The claim made by the exceptant cannot be allowed upon the account of the trustee of the fund awarded in trust on the adjudication of the executors' account, not only because of the decree of confirmation and distribution is a final one, unimpeachable collaterally, but also because the fund embraced in the present accounting is not that of the estate of William McCann. The adjudication of the account of the executors and the distribution of the estate in their hands ended it. The award to Mrs. Walker became her property, and the award to the trustees became the property of the trust for the uses and purposes thereof. *McCown's Estate*, 221 Pa. 324.

It is contended by the exceptant that notwithstanding Mrs. Walker was beneficially interested in the will of her father, she was permitted to claim adversely to the estate, and was awarded the \$7600 mortgage, which is the amount the exceptant claims the estate of the surviving trustee should now be surcharged with. The exceptant cites *Cox v. Rogers*, 77 Pa. 160, and *Zimmerman v. Lebo*, 151 Pa. 345, that Mrs. Walker could not accept the benefit of the will, and at the same time be awarded an adverse claim. That is a well established principle of law. But did she claim anything more than what the testator admitted, and which the undisputed facts showed belonged to her? The auditor so found and so decreed. The testator gave his daughter all the interest he had in the mortgage during her life, and the principal at her death to her child or children, and in default of issue to the child or children of James G. Wells, living at that time. But he had no estate, right, title or interest in the mortgage by his own express declaration, although he

had taken it in his name. This finding is conclusive and cannot be impeached in this proceeding.

The claim that the estate of the deceased trustee shall be surcharged with \$7600, the principal of the mortgage heretofore awarded her individually by the court in 1884, is not sustained. The exception is dismissed.

The balance of principal and income shown by the account, together with any income received since the account was filed, subject to the payment of the collateral inheritance tax, due the Commonwealth, if any, is awarded to Hepsey Norris Wells.

Authority is hereby given the accountants to make all necessary transfers of the securities in which part of the principal is invested, to the said Hepsey Norris Wells.

ARNOLD v. M'KELVEY.

Costs—Appeal from Taxation—Service of Subpoena by Attorney.

1. A successful plaintiff's right to recover full costs and his exemption from the payment of any costs to the defendant in an action of trespass is not a matter of practice, but one of statutory right, beyond the power of the court to control, and while the court may as a matter of practice, impose the costs of the term upon the party by reason of whose default a continuance is granted, such costs follow the final judgment, the same as the other costs of the parties to the action.

2. When the service of the subpoena by the attorney for a successful litigant is a good service, the adversary must pay the costs thereof in all cases in which the judgment carries costs.

Appeal by plaintiff from Prothonotary's taxation of costs. In the Court of Common Pleas of Northampton County, No. 39 September Term, 1912.

Wm. Fackenthall, for Plaintiffs.
Evans & Beck, for Defendant.

The opinion of the court was delivered March 9, 1917, by McKeen, J. This is an appeal by the plaintiffs, from the taxation of costs by the prothonotary. The facts, as they appear from the record, are as follows: The plaintiffs recovered a final judgment against the defendant, who thereafter deposited with the prothonotary the full amount of the costs claimed by the plaintiffs, and

caused the same to be taxed. The matters complained of which are the subject matter of this appeal are the plaintiffs' and defendant's costs for January court, 1913, and the costs of the service of the plaintiffs' subpoenas for October term, 1914. The case was on the trial list for January court, 1913, and was continued on the application of the plaintiffs. The defendant filed a bill of costs for witness fees and mileage and the service of subpoenas for that court, amounting to \$28.00. which bill was verified by affidavit and filed within five days after the continuance of the case, and the amount thereof was deposited with the prothonotary by the plaintiffs before the case was proceeded with. After the plaintiffs had secured a final judgment, they filed their bills of costs and included therein the \$28.00 which they had paid to the prothonotary for the defendant's costs for January court, 1913, and \$22.30 for their own witnesses and subpoenas for the same court. The plaintiffs also included in their bill \$32.80 for the service of subpoenas by their counsel for October term, 1914. The defendant objected (1) to the payment of any costs for January court, 1913, because he had complied with section 50 of the rules of court, which provides that "All the costs of the term shall be paid by the party through whose default a cause on the trial list is continued, if the bill for the same, verified by affidavit is filed within five days after the continuance. If the costs are not paid when or before the cause is next called for trial, the trial shall proceed, but unless the non-payment is the result of poverty, the party in default shall not be permitted to offer any evidence," and (2) to the payment of the costs of serving plaintiffs' subpoenas for October term, 1914, because the service had been made by plaintiffs' counsel. The plaintiffs, however, contended that having obtained a final judgment (1) they are entitled to full costs, and (2) the defendant is not entitled to any costs. The prothonotary sustained the objections of the defendant and the plaintiffs took this appeal.

It is seen from the foregoing, that there is no contention that the witness fees and mileage and the costs of the service of subpoenas which go to make up the three items as to which the plaintiffs have appealed are not properly costs, within the ordinary and general acceptance of that term, and that the items \$22.30 for January

court, 1913, and \$32.80 for October term, 1914, are costs of the plaintiffs, and the item \$28.00 for January court, 1913, is for costs of the defendant, paid by the plaintiffs, which they are now asking to have paid back to them.

Costs in Pennsylvania are statutory. In *Black's Appeal*, 106 Pa., 344, which was a feigned issue to test the ownership of certain money which had been attached in the hands of a garnishee and paid into court, the verdict was for the defendant, and the court directed that one-half of the costs be paid by the plaintiff and the other half by the defendant. On appeal to the supreme court, it was held that the costs follow the verdict and judgment as in ordinary common law cases, and the court has no power to make any order, the effect of which will be to prevent the winning party from proceeding to collect full costs from the losing party.

In delivering the opinion of the court in *Black's Appeal*, supra, Mr. Justice Sterrett says, at pages 348 and 349:

"At common law no costs were allowed, the amercement of the vanquished party being his only punishment, but in assessing damages, costs were generally considered by the jury and included in their verdict. Costs, *eo nomine*, were first given to plaintiffs by the Statute of Gloucester, 6 Edw. I., c. 1. Afterwards, by Statutes 23 Henry VIII, c. 15, 4 Jac. I, c. 3, 8 and 9; Wm. III, c. 12, and 4 and 5 Anne, c. 16, the successful defendant was allowed the same costs as the plaintiff would have been entitled to, if he had recovered: 4 *Minor's Institutes*, 788, 3 *Blackstone*, 399. With some statutory limitations and qualifications, which it is unnecessary to specially notice, the rule thus established in England has always been recognized and enforced here. In equity the practice is different, but in actions at law, the general rule undoubtedly is that costs follow the judgment; and hence it is incumbent on an unsuccessful litigant, who claims either partial or entire relief from the costs of suit, to point to the statute that warrants exemption from the burden."

See also: *Bennage v. Union County*, 22 Pa. Co. Ct., 342; *Scott v. Borough of Fairfield*, 23 Pa. Co. Ct., 114; *Maxwell v. Ludwick Borough*, 7 Dist., 523; *Savage v. McHale*, 8 Dist., 560; *Beardsley v. Plank Road Company*, 5 Clark, 306; *Small v. Arnhold*, 17 Phila., 256.

There is no act of assembly in Pennsylvania which imposes the costs of the term upon the party at whose instance or by reason of whose default the continuance is granted, and the defendant relies wholly upon section 50 of the rules of court, above quoted, to support his contention as to the costs for January court, 1913. The question therefore is as to the power of the court over costs. The Act of June 16, 1836, P. L. 784-794, which prescribes the jurisdiction and defines the powers of the supreme court, the court of common pleas, the orphans' court, the court of oyer and terminer and the court of quarter sessions, does not include among the powers given to them power over costs, unless the twenty-first section, P. L. 792, Purdon 636, par. 92, and Purdon 3370, par. 24, which gives the courts power to establish rules of practice, be held to confer such power. The twenty-first section, in full is as follows: "Each of the said courts shall have full power and authority to establish such rules for regulating the practice thereof respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper; provided, that such rules shall not be inconsistent with the constitution and laws of this commonwealth." This section was reenacted as to the courts of oyer and terminer and quarter session, by the thirty-second section of the Act of March 31, 1860, P. L. 438, Purdon 3729, par. 30. It is seen that this section makes no mention of costs, but the sixth section of the Act of March 11, 1836, P. L. 77, passed by the same legislature three months and five days earlier than the Act of June 16, 1836, supra, which gives the district court of the city and county of Philadelphia power to make rules of practice, expressly gives that court the further power to make "such rules for carrying the same into effect, either by way of staying proceedings in the action, or by the payment of costs, or otherwise, as shall be conducive to fairness, economy and despatch in the trial of such actions." And notwithstanding the fact that the equity court has always had discretionary power over costs,—Wadlinger on Costs, 359,—the eighteenth section of the act relating to executions, approved June 16, 1836, P. L. 764, Purdon 1414, par. 21, that is to say, an act approved on the same day as the Act of June 16, 1836, P. L. 784-794; supra, provides that "The costs of all pro-

ceedings as aforesaid, shall be within the discretion of the court in which the bill shall be filed, who shall have power to direct payments of the same, by either of the parties to such bill, according to the rules of equity and justice." If, therefore, the legislature either by the twenty-first section of the Act of June 16, 1836, *supra*, or by any other part of the act, had meant to give the court power over final cost, it seems probable that it would have done so in express terms. The practical effect of section 50 of the rules of court in this case is (1) to give a successful plaintiff less than full costs, which is in contravention of the Statute of Gloucester (6 Edward I, chapter 1), which gives a successful plaintiff full costs, and (2) to give an unsuccessful defendant partial costs, while the statutes of 23 Henry VIII, Chapter 15, 4 James I, chapter 3, 8 and 9 William III, Chapter 12, and 4 and 5 Anne, chapter 16, allow costs only to a successful defendant, and the rule offends against the proviso of the section, in that it is inconsistent with the laws of this commonwealth. While, therefore, it may be within the power of the court to regulate costs in interlocutory proceedings, it cannot, by rule, or otherwise, control the final disposition of them. The effect of rules of court like this on final costs does not seem to have been passed upon by the appellate courts, but in *Baintrim Independent School District*, 23 Pa. Co. Ct., 510, (quarter sessions of Wyoming county), where the application was to have the costs of an unsuccessful attempt to abolish an independent school district, including the costs of depositions taken by those opposed to the application, paid by the petitioners, Dunham, P. J., says, at page 511: "We are asked now to direct that the petitioners shall pay all costs in the case; officers' costs, and costs of witnesses and officers for taking depositions. Counsel who represents the rule for costs have referred us to the rules of court of common pleas and quarter sessions of Wyoming county to the effect that costs of taking depositions shall be allowed upon any case or in the argument of any rule to the successful party. Also to *Wadlinger on Costs*, and decisions of courts upon the same point. There can be no doubt that in all cases where costs are recoverable, that costs of taking depositions are as much a proper subject of costs as witnesses produced in court. Neither can a rule of court authorize the imposi-

tion of costs in cases where the same is not authorized by act of assembly, as the principle that the right to costs depends entirely upon statute, is too familiar to need any citation of authorities to sustain it. In the present case there appears to be no provision made in the statute for imposing costs, and we are entirely powerless to direct the petitioners to pay costs not made by them, and must leave the parties to provide for such costs as they have made in the premises." A successful plaintiff's right to recover full costs and his exemption from the payment of any costs to the defendant in an action of trespass, is not a matter of practice, but one of statutory right, and while the court may, as a matter of practice, impose the costs of the term upon the party by reason of whose default a continuance is granted, such costs follow the final judgment, the same as the other costs of the parties to the action. The plaintiffs are, therefore, entitled to recover from the defendant the \$28.00 which they paid to the prothonotary for the defendant's cost for January court, 1913, and the \$22.30 for their own witnesses and subpoenas for the same court.

The only objection urged against the costs of the subpoenas for October term, 1914, is that as it was served by the plaintiff's attorney, the defendant is not liable for the costs of the service. In support of his contention the defendant cites and relies upon the case of *East Allen Township v. Street Railway Company*, 9 Maxwell, 133; 13 Dist., 668, in which case one of the reasons for disallowing the costs of a subpoena served by the attorney is stated thus: "Such assistance to the client in the case will be treated as covered by his general retainer. If he could not properly demand this compensation from his own client in the event of an adverse verdict, it cannot be included in a bill of costs for him when the result is otherwise." A different view of the question is, however, taken in the later case of *Weaver v. Oberholtzer*, 16 Dist., 767, (Juniata county), where the court say: "No bar is interposed against such service, no injury is sustained, no injustice is wrought to the party seeking redress. The fees charged are the same as that to which a sheriff would be entitled, not a farthing more. And they being proper witnesses duly and legally subpoenaed in good faith, and their testimony pertinent to the issue, we find no reason

in law and good conscience why the party should not be compensated for the same service in like amount which any other would receive for similar services." Neither of these cases, however, advert to the rule laid down in *Black's Appeal*, 106 Pa. 344, supra, that "it is incumbent on an unsuccessful litigant who claims either partial or entire relief from costs to point to some statute that warrants exemption from the burden." There is no statutory direction in Pennsylvania as to who shall or may not serve a subpoena in a case like this, and the courts have repeatedly said that the party may serve them himself, have them served by an officer or by a private citizen: *McAlister v. Armstrong County*, 9 Pa. Superior Ct., 423; *O'Leary v. Northumberland County*, 24 Pa. Superior Ct., 24; *Kottcamp v. York County*, 28 Pa. Superior Ct., 97. And when the service of the subpoena by the attorney of the successful litigants is a good service, the adversary must pay the costs thereof in all cases in which the judgment carries costs. The plaintiffs are, therefore, entitled to receive from the defendant the item of \$32.80 for the costs of the service of the subpoena for October term, 1914, made by their attorney.

And now, March 9, 1917, appeal sustained.

ESTATE OF THOMAS HOLMES, DECEASED.

Decedent's Estate—Bank Deposits—Insurance—Beneficial Society Donations.

Deposits made in a bank by a husband, payable to either himself "or" his wife or to himself "and" his wife, constitutes an estate by entireties, and the legal ownership thereof vests in the survivor.

Payment of death benefits by a life insurance company to the widow of the insured is a discharge of the company's obligation under a policy which provides that payment may be made to either the executor or administrator, husband or wife, or any relative by blood, or lawful beneficiary, of the insured, and that a receipt in full signed by either of them, together with the surrendered policy, shall be conclusive evidence of payment of all claims thereunder.

Contributions by beneficial societies to defray funeral expenses of a deceased member cannot be diverted from that use.

But as to the portion of such contributions beyond what is necessary to discharge the funeral expenses, there is no trust, and where decedent's family consists of the widow and four children, all of age, the widow is entitled to the surplus absolutely.

Where by-laws of a beneficial society provide for the payment of a sum of money to the nearest relative of a deceased member, and no appropriation or further provision is made for its application, there is no obligation to apply any part of such sum to funeral expenses.

Exceptions to account. In the Orphans' Court of Lackawanna County. No. 957, Year, 1914.

A. A. Vosburg and J. B. Jenkins, for Exceptants.
W. J. Fitzgerald, of O'Brien & Kelly, for Accountant.

Sando, P. J., June 15, 1917—On behalf of Mary Kelly, a daughter of the decedent, five exceptions have been filed to the first and final account of Alice Holmes, administratrix of the estate of Thomas Holmes, deceased.

By the first exception it is sought to surcharge the accountant with money on deposit in a bank at the time of the death of the decedent, alleged to have been the property of the decedent, and forming a part of his estate.

The decedent, Thomas Holmes, died intestate on the 3rd day of December, 1914, leaving to survive him a widow Alice Holmes and four children, all of whom are of age. Letters of administration on the estate were granted on December 28, 1914, to Alice Holmes.

From the evidence it appears that Thomas Holmes—who had been married before—and Alice Holmes, now his widow, were married about twenty-four years ago; that on March 11, 1895, with a deposit of \$300, an account was opened in the First National Bank of Scranton in the names of Alice or Thomas Holmes, which account remained in these names in this manner until Alice Holmes prior to taking out letters of administration drew from the bank the balance standing therein.

Where deposits are made in a bank by a husband, payable to himself or wife, or to himself and wife, the account is held by entirety and the legal ownership thereof vests in the survivor; Sloan's Estate, 254 Pa., 346, in which opinion Mr. Justice Walling cites Klenke's Estate, 210 Pa., 572, which is to the effect that it does not make any difference whether the word "and" or the word "or" is used; in either case it constitutes an estate by entirety and goes to the survivor. To the same effect is Black v. Cockins, 252 Pa., 56.

The first exception is dismissed.

The Metropolitan Life Insurance Company issued a policy on the life of Thomas Holmes which contained inter alia:

"Doth hereby agree, subject to the conditions set

forth below and on the reverse side hereof, each and all of which are hereby made a part of this contract and are accepted by the assured as part thereof as fully as if herein recited, to pay to one of the persons described in Condition First, upon receipt of proofs made in the manner, to the extent and upon the blanks required by Condition Sixth, of the death occurring more than one year after the date hereof, of Thomas Holmes and upon surrender of this policy and all the receipt books, the sum of Five Hundred Dollars."

The policy of insurance contained further, inter alia:

"First. The Company may pay this policy to either the executor or administrator, husband or wife, or any relative by blood, or lawful beneficiary, of the insured, and the production by the Company of the policy and a receipt in full, signed by either of them, shall be conclusive evidence that all claims upon said Company under this policy have been fully satisfied."

From the foregoing it appears that the sum payable under the policy could be paid to any one of several different persons, among whom is the widow, and that payment to her would discharge the obligation of the company in full.

The condition in the policy made the company the judge as to who was the person entitled to the money: *Thomas v. Prudential Insurance Company*, 148 Pa., 594.

The amount due on the policy was on December 11, 1914, paid to Alice Holmes.

The second exception is dismissed.

By the third exception it is sought to surcharge the accountant with certain moneys received from beneficial societies of which the decedent was in his lifetime a member, which sums paid since his death are alleged to form a part of the estate.

The decedent was a member of Division No. 16 of the Ancient Order of Hibernians, the Constitution of which at page 26 under Article 25, Section 6, provides: "On the death of a beneficial member in good standing a sum of not less than fifty dollars shall be appropriated to pay his funeral expenses, * * *; which provision was in force at the time of the death of Thomas Holmes.

Mr. O'Connor, the treasurer of the society, testified that the custom has prevailed for a number of years for

the local division or body to pay the sum of seventy-five dollars to the wife; that while not less than fifty dollars must be paid, it is optional with the division to pay whatever sum above that amount they desire to pay; that by motion some time ago the division made the benefit seventy-five dollars; that acting under instructions from the society he paid that amount, by check dated December 14, 1914, payable to the order of Mrs. Thomas Holmes.

The High Works Young Men's Beneficial Society of Providence, Pa., paid to Alice Holmes the sum of one hundred dollars. The by-laws of the society at page 22, by Article 14, section 2, provides: "In case of the death of a beneficial member there shall be appropriated out of the funds of the society the sum of one hundred dollars (\$100) and the same to be replaced by a levy on the members, to defray funeral expenses; said sum to be paid to the nearest competent relative, * * *."

Mr. M. J. Loftus testified, inter alia, that as the financial secretary of St. Joseph's Literary and Benevolent Society, of Providence, Pa., he drew an order for seventy-five dollars (\$75), payable to the order of the estate of Thomas Holmes; that such was the custom for ten or eleven years on the death of a member; and that such was the agreement of the officers, consisting of the president, vice-president, financial secretary, treasurer and recording secretary; the idea being to protect the society. The by-laws of this society at page 32, by Article 13, section 2, provides: "In case of the death of a beneficial member there shall be appropriated out of the funds of this society the sum of \$75 to defray funeral expenses; said sum to be paid to the nearest competent relative, * * *."

Funds received by the widow from beneficial orders, to which decedent belonged, for funeral expenses, cannot be diverted from that use: Griffiths Estate, 1 Lack. Leg. News, 311.

Contributions by beneficial societies and other organizations for the assistance and relief either of the widow or family of the deceased member, or to defray the expenses of his interment, will not be allowed to be diverted into any other channel. * * * And, if to relieve them from the cost of the burial of their deceased hus-

band or father, they are to be so used: Haas Estate, 18 Phila. Rep., 185.

As to the portion of funds received from Division No. 16, Ancient Order of Hibernians, The High Works Young Men's Beneficial Society of Providence and St. Joseph's Literary and Benevolent Society of Providence, beyond what was necessary to discharge the funeral expenses, there is no trust, and to this the widow is entitled absolutely: Martin's Estate, 2 Chester Co. Rep., 47.

The by-laws of the Storrs' Mines Accidental Fund and Beneficial Association of Dickson City Borough, at page 12, by Article 13, provides:

"Sec. 1. At the death of a full rate member in good standing, caused by injury received while attending to his usual or any other legitimate employment, the sum of One Hundred (\$100.00) Dollars shall be paid the nearest relative of the deceased, or to whomsoever he may have appointed.

Sec. 2. Should a full rate member in good standing die any other kind of a death, after being a member of the Association for a period of not less than one year, the sum of One Hundred (\$100.00) Dollars shall be paid the nearest relative of the deceased, or to whomsoever he may have appointed."

Where the by-laws of a beneficial society provides for the payment of a sum of money, but no appropriation is made for funeral expenses, the widow need not use for the funeral expenses any part of such sum in the absence of a further provision so requiring: Metzroth's Estate, 26 Lanc. Law Rev., 257.

Our rulings on the first, second and third exceptions dispose of the subject matter of the fourth exception which is therefore dismissed.

The rules of this court require that all exceptions should be specific and not general.

The fifth exception is dismissed.

Now, June 15th, 1917, upon due consideration and upon the foregoing disposition of the exceptions filed to the first and final account of Alice Holmes, administratrix of the estate of Thomas Holmes, deceased, the account is confirmed finally.

**SHREINER v. CODORUS AND MANHEIM M. P.
INSURANCE COMPANY. NO. 2.***Fire Insurance—False Answers—Particularity.*

Plaintiff brought suit on a policy of insurance, averring loss by fire. The affidavit of defense alleged false answers in the application to the questions as to whether the property insured was encumbered, and as to whether the defendant had ever suffered a loss by fire before. Held, that a motion for judgment for want of a sufficient affidavit of defense must be refused.

An affidavit of defense which is as specific as the plaintiff's statement, is sufficient to prevent summary judgment.

In the Court of Common Pleas of York County. No. 123, August Term, 1915. Motion for judgment for want of a sufficient affidavit of defense.

The statement in this case is found in *Shreiner v. Codorus and Manheim M. P. Co.*, 30 York Legal Record 106.

The substance of the affidavit of defense is found in the Court's opinion in this case.

The reasons of the motion for judgment for want of a sufficient affidavit of defense are as follows:

1. The affidavit of defense is made and sworn to by W. H. Brodbeck, Secretary of said Defendant Company and does not state that said Defendant Company, "has a just, true, full and legal defense to all or part of plaintiff's claim."

2. There is no averment in said affidavit, that Defendant expects to be able to prove the facts set out in said affidavit.

3. The averment in said affidavit that plaintiff is guilty of fraud and false swearing in making up his proof of loss, does not show how or in what manner said fraud was perpetrated upon defendant.

4. That said affidavit avers that the various sums claimed by the plaintiff are grossly excessive, but does not state sufficient facts upon which to base a claim of how the defendant company arrives at such a conclusion.

5. The affidavit of defense is vague, the averments general in their character, and generally insufficient to prevent judgment.

6. The affidavit avers that the proof of loss furnished by said plaintiff was rejected by said defendant, without stating in what particular the proofs were objectionable, nor does said affidavit aver that any suggestion was

made to plaintiff wherein said proofs of loss were not in accordance with the terms of the policy.

C. W. A. Rochow, for Motion.
Stewart & Gerber, Contra.

June 25, 1917. Ross, J.—This case has been before the court on the defendant's demurrer to plaintiff's statement to claim. After argument the demurrer was refused and the defendant was ordered to plead over within fifteen days from the date of that ruling; 30 York Legal Record 106.

The case is now before the court on the plaintiff's motion for judgment for want of sufficient affidavit of defense. Since the adoption of the practice under the Act of May 25th, 1887, P. L. 271, judgment may be taken for want of an affidavit of defense, or of a sufficient affidavit of defense; L. S. Herb et al. v. Littaning Ins. Co., 138 Pa. 174.

"While the construction of an affidavit of defense should be in favor of plaintiff and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement;" Barker v. Fairchild et al., 158 Pa. 246.

In the present case the plaintiff's statement "claims of the defendant" * * * "the sum of one thousand nine hundred and forty dollars, with interest from the 30th day of November, 1914, according to a certain policy of insurance, in writing, executed and delivered to the plaintiff by defendant, on or about the latter part of January or beginning of February, 1914.

"A copy of the policy (as averred by the statement) is annexed to the statement and made a part thereof, as "Exhibit A."

The statement also avers (among other things) "That on the 23rd day of September, 1914, at Warrington Township, the premises in said policy of insurance mentioned were destroyed by fire" * * * "on September 23rd, 1914, at the Borough of Dillsburg, said County of York, Pa., the plaintiff gave notice to the defendant of the fire and loss, and on or about September 30th, 1914, at the City of York, York County, Pa., did deliver to the defendant a particular account of the plaintiff's loss and

damage, and also of the value of the premises insured, and when and how the fire originated to the best of the plaintiff's knowledge and annexed to said notice was a certificate under the hand and seal of a justice of the peace, of Jonathan Cassel, who lived most contiguous to the property destroyed by fire, stating that he was acquainted with the character and circumstances of the insured, and without fraud, he, the plaintiff, had sustained a loss or damage upon the premises insured to the sum of one thousand, nine hundred and forty dollars, yet the defendant has not paid to the plaintiff the said sum of money by it insured" * * * "nor repaid or reimbursed him for the loss sustained by the said fire or any part thereof" * * * "contrary to the form and effect of the policy of insurance."

A reference to the copy of the policy annexed to the statement as "Exhibit A," discloses that the policy "does insure" * * * "against all direct loss or damage by fire and lightning, except as hereinafter provided, to an amount not exceeding two thousand, nine hundred and thirty-five dollars on the following property while located and contained as described herein, and not elsewhere, to wit:

"\$450.00 on his two-story frame, shingle roofed dwelling, and additions thereto adjoining and communicating.

"300.00 on his household and kitchen furniture, useful and ornamental, family wearing apparel and materials for same, provisions, printed and bound books, music, watches, jewelry in use, silver and plated ware, china, glass, queens and crockeryware, pictures, paintings, engravings and mirrors (with their frames at not exceeding cost), travelling apparatus, musical and scientific instruments, statuary, ornaments, sewing machines, sporting outfits, fuel and family stores and all articles generally used in housekeeping, the property of the assured or any member of the family. All while contained in the above described building.

"1100.00 on his frame bank barn and additions thereto.

"\$200.00 on his frame grain and hay shed or stable.

"\$75.00 on his frame hog stable and corn crib.

"\$140.00 on his farm machinery and implements and pleasure vehicles while on premises.

"\$250.00 on his produce, consisting principally of hay, grain, straw and other products of a farm, while on premises.

"50.00 on his horse gears and harness while on premises.

"\$250.00 on his horses, not exceeding \$125.00 for any one animal.

"\$120.00 on his live stock, not exceeding \$40.00 for any one animal.

"All situate in Warrington Township, York County, Pa.

"Standard lightning clause attached.

"Attached to and forming part of policy No. 26972 of the Codorus and Manheim Mutual Protection Insurance Company of York, Pa."

The written application of plaintiff for insurance, which is printed on the back of the policy, among other things, includes the following questions and answers: "17. Is the property hereby insured incumbered by mortgage, judgment or any other lien, and if so, to what amount?" "No."

"14. Have you ever suffered loss of property by fire? If so, were you insured and in what company?" "No."

The affidavit of defense specifically denies the truth of those answers, and avers that, at the time the plaintiff answered the said interrogations there were two judgments entered as liens against the property of the said J. H. W. Shreiner insured by the said policy as follows: Peter Warner, No. 659, January Term, 1912, entered March 29, 1912, for \$250. One of Jacob M. Gotshall, No. 394 August Term, 1911, entered October 13, 1911, for \$400.

It also avers that the answer made to the 14th interrogatory was not true, for the reason that the said J. H. W. Shreiner had a fire loss in the month of May, 1914, by the burning of his stable on North Market street, in the town of Mechanicsburg, Cumberland County, Pa. Those averments are specific, and if properly proven will require an explanation which cannot be derived from the plaintiff's statement.

"On the hearing of a rule for judgment for want of a sufficient affidavit of defense the court may not go outside of the case as presented by the claim and affidavit, to consider extraneous facts, either in support of or against the line of defense disclosed;" *Allegheny City v. Charlotte McCaffrey*, 131 Pa. 137; *Beruhardt v. Taylor*, 223 Pa. 307.

It will be observed that the suit is brought to recover for loss by fire, on a policy which specifically designates the amounts placed on clearly specified property, as \$450 on his two-story frame shingle roof dwelling and additions."

"\$300.00 on his household and kitchen furniture," etc.

"\$1100.00 on his frame bank barn and additions thereto."

"\$200.00 on his grain and hay shed or stable."

Specific amounts are placed on each of six other plainly described items.

The statement claims an aggregate sum and there is nothing on the record, or legally before the court which would enable it to determine whether all, or if not all, which of the items insured had been destroyed or damaged.

If the affidavit of defense would only deny the truth or accuracy of the aggregate amount claimed in the statement in as general a way as the claim is made, it would be such a direct answer to the claim as would require plaintiff to prove his claim.

In the case of *Giordano v. St. Paul F. & M. Ins. Co.*, 63 Pa. Sup. Ct. 236, Mr. Justice Trexler, speaking for the Superior Court said, "The plaintiff in his statement sets forth his loss in a lump figure. The defendant in his defense uses the same method. We see no reason why the defendant should be held to a greater particularity than the plaintiff; *Wiland v. Royal Ins. Co.*, 61 Pa. Superior Ct. 409."

For these reasons, the affidavit of defense in this case, in our opinion, is sufficient to prevent summary judgment.

Motion for judgment for want of a sufficient affidavit of defense is refused.

COMMONWEALTH v. GEORGE ET AL.

Summary Conviction Fishing—Navigable Stream—Prescription—Act of April 14, 1905, P. L. 169.—Burden of Proof.

If the owner of the bed of the creek duly posted it in compliance with the Act of April 14, 1905, P. L. 169, a person fishing therein is liable to the penalty provided by said Act.

A prescriptive right to fish based upon periodical excursions to a pond or stream, in common with others, for any number of years, can not be acquired.

The burden of proving that a stream is a navigable stream is upon the defendant.

In the Court of Quarter Sessions of Lehigh County.
Commonwealth of Pennsylvania v. Jacob George and
Henry Hartzell.

Butz & Rupp, for Commonwealth.

Allen W. Hagenbach and Fred E. Lewis, for Defendants.

Groman, P. J., June 4, 1917. The defendants, enthusiastic disciples of Isaac Walton, while whipping the middle of a stream fishing for our gamey native brook trout, finally reached the lands of Mrs. Sefing, over and through whose lands flows the finest trout stream in this region, a stream so famed for over one hundred years. Mrs. Sefing, womanlike, however, not being imbued with the same spirit of sportsmanship that evidently warmed the cockles of the hearts of our friends of the rod and reel, with unsympathetic haste promptly invoked the aid of the law and our two defendants found themselves in dur-
ance, charged with having committed a trespass on the property of the aforesaid Mrs. Sefing, contrary to the provisions of the Act of April 14, 1905. A hearing was held before Alderman Bower of the City of Allentown; the alderman, however, seems never to have heard the music of the reel nor of the delights or pleasures of a well filled creel. Neither the call of the wild, nor the lure of the open softened the heart of the aforesaid alderman, for we find that on February 7th, 1917, at eight o'clock P. M., the defendants were found guilty, sentenced to pay a fine of ten (\$10.00) dollars, costs of prosecution, and in default of payment to be committed to the Lehigh County Jail for five days each; thus were the defendants brought down to the dead level of ordinary every-day individuals.

The defendants, however, hied themselves to a higher and what they, no doubt, concluded to be a more sympathetic court, and from said court, secured a rule to show cause why a special allocatur should not be allowed.

It appears that our two fisher folk desire to establish once for all the rights to such parts of the stream as the law might accord to the public in general and to fisher folk in particular. We must admit that if this case could be decided on sentimental or sympathetic grounds only, our two fisher folk by far and away would have clear sailing; unfortunately, however, courts must not so decide matters brought to their attention; this being so, in passing upon the question whether or not the rule herein granted should be made absolute, we come to the parting of the ways.

An appeal in a summary conviction is not a matter of right, in fact, the courts do not encourage such appeals and will not allow the same save for cause shown: *McGuire v. Shenandoh*, 109 Pa. St., Page 613; *Commonwealth v. Eichenberg*, 140 Pa. St., Page 158; *Commonwealth v. Yocum*, 29 Pa. Sup. Ct., Page 428. In *Commonwealth v. Johnston*, *Supra.*, the proper practice is also set forth on a rule to show cause why an appeal should not be allowed. *Wickham, J.*, in *Thompson v. Preston*, 5 Pa. Sup. Ct., Page 154 (1897) states the rule as follows:

"Ordinarily an appeal should not be permitted, if the party desiring it has had an opportunity to fully and fairly present his case before the magistrate, unless a doubtful legal question is involved, or there is something to indicate oppression, corruption or disregard of law on the part of the magistrate, or after discovered evidence which would justify a new trial, under the well known rules relating to new trials for that cause. Neither Art. V, Section 14 of the constitution, nor the Act of 1876, which were passed to carry it into effect, contemplates that an appeal shall be allowed merely because the party desiring it is dissatisfied with the result of the trial before the magistrate, as is the case with most defeated litigants, and cheers himself with hopes of better success in the next encounter."

The petition in the proceedings must also fully set forth sufficient facts without requiring the court to go outside of the petition: *Commonwealth v. Menjou*, 174

Pa. St., Page 25. The whole matter of the allowance of an appeal in such cases rests in the sound discretion of the court below: *Commonwealth v. Hendley*, 7 Pa. Sup. Ct., Page 356 (1898).

This proceeding is brought under the Act of April 14, 1905. The testimony taken in the case is full and voluminous. It appears the Commonwealth and defendants were represented by able counsel. All phases of the questions involved and the testimony relative thereto were fully presented before the alderman, and the record made up. The defendants were accorded every opportunity to fully and fairly present their defense. No oppression, corruption or disregard of law is alleged; the only question raised is that a doubtful legal question was involved.

The contention of the defendants is that the stream flowing through the land of Mrs. Sefing is a navigable stream; the burden of proving that the stream is such rests upon the defendants. The court's attention, however, has not been called to any act making or declaring it to be such prior to the passage of the Act of May 29th, 1901, P. L. 302, nor since, and the said act does not declare it to be a navigable stream. The case before us in the facts presented, and the questions of law involved falls within the decision of *Commonwealth ex rel. v. Foster*, 36 Pa. Sup. Ct., Page 433 (1908), wherein the Superior Court held that "if the owner of the bed of the creek duly posted it in compliance with the Act of April 14, 1905, P. L. 169, a person fishing therein, is liable to the penalty provided by the latter act."

Defendants further contend that the public had a prescriptive rights to fish the particular part of the stream in question. In *Gibbs v. Sweet*, 20 Pa. Sup. Ct., Page 275, (1902) we find the rule applicable to this feature of the case stated as follows:

"A prescriptive right to fish based upon periodical excursions to a pond or stream, in common with others for any number of years, cannot be acquired. If the owner of such pond or stream suffers the public to fish in it without objection, a user by an individual not distinct from that of the public will be considered permissive and not adverse, unless there is evidence that it is under claim

of right in himself, and that the owner knowing of the claim acquiesced in it."

Now June 4, 1917, rule for special allocatur discharged.

FLYTE v. STOVER.

Landlord and Tenant—Eviction—Act of April 3, 1830, P. L. 130—Justice of the Peace—Judgments.

A tenant for a more or less indeterminate period is subject to the provisions of the Act of April 3, 1830, P. L. 130, in a proceeding by the landlord to obtain possession of the premises.

If the justice had no jurisdiction of the subject matter or of the parties, a judgment entered by him could be attacked directly or collaterally.

For mere irregularities in the proceeding, however, the judgment must be attacked through an appeal. Defendant failing to appeal in such a case, the landlord cannot be held liable as a trespasser *ab initio*.

In the Court of Common Pleas of Lehigh County.
Ada M. Flyte v. Ellen Stover. No. 37 June Term, 1916.

Warren K. Miller, for Plaintiff.

Thomas F. Diefenderfer, for Defendant.

Groman, P. J., June 18, 1917. The question most vital to the issue involved in the above suit is: was the defendant, the landlord of plaintiff, a trespasser *ab initio* in a proceeding for dispossession under the Act of Assembly of April 3, 1830, P. L. 130, Section 1.

The plaintiff contends that the act conferred no jurisdiction and that, therefore, defendant should respond in damages for an unlawful eviction; the defendant contends that the act authorized the proceeding had before the alderman, that the proceedings were regular, and that, therefore, there could be no recovery. Now then, what are the provisions of the Act of April 3, 1830? An examination of Section 1 of the act discloses the following provisions: "In case any lessee for a term of years, or at will, or otherwise, of a messuage, lands or tenements, upon the demise whereof any rents are or shall be reserved, where the lessee shall neglect or refuse to pay rent reserved as often as the same may grow due according to the terms of the contract, and where there are no goods on the premises adequate to pay the said rent so in

arrear, except such articles as are exempt from levy and sale by the laws of the commonwealth. * * *."

The act thus provides that "any lessee for a term of years, or at will, or otherwise * * * shall neglect or refuse to pay rent reserved" shall be subject to the provisions thereof for neglect or refusal to pay rent reserved. The above language seems to us to be wide enough to include the tenancy which existed between the plaintiff and defendant; the plaintiff admitting that the rental was to be \$15.00 per month for a more or less indeterminate period. We, therefore, conclude the alderman had jurisdiction. Were the proceedings had before the alderman so irregular that a dispossession based upon the record made the defendant liable as a trespasser ab initio? An examination of the record of the proceedings had before the alderman convinces us the proceedings were regular and in accordance with the provisions of the act, and that the judgment entered by the alderman can be sustained by matters appearing of record.

If there had been no jurisdiction of the subject matter or of the parties, the judgment would be without effect in law, and could be attacked directly or collaterally: *Camp v. Wood*, 10 Watts, Page 118; *Wall v. Wall*, 123 Pa. St., Page 545.

It was argued that certain irregularities in the proceedings before the alderman vitiated the proceedings, and that defendant, therefore, became liable as a trespasser ab initio. A defect or irregularity in the proceedings should have been taken advantage of by the defendant by taking an appeal, this, however, was not done and the judgment remains valid until vacated or reversed: *Sweeney v. Girolo*, 154 Pa. St., Page 609; *Ogle v. Baker*, 137 Pa. St., Page 378.

Now June 18, 1917, motion to take off non-suit dismissed.

RICHEY v. HARFOSH.

Commissions on Sale of Real Estate—Principal and Agent.

When a real estate broker opens negotiations with a prospective buyer of real estate, the owner cannot annul such negotiations, sell the property and refuse to pay commission to the broker.

In the Court of Common Pleas of Schuylkill County.
Motion for New Trial. No. 386, March Term, 1916.

W. B. Durkin, for Plaintiff.

E. W. Shoemaker, for Defendant.

Koch, J., April 30, 1917. This case comes into court by appeal from a justice of the peace. The plaintiff's claim is, in effect, that the defendant entered into a contract with the plaintiff on or about the 6th of April, 1915, "whereby it was agreed that the plaintiff should sell the property of the defendant at No. 1 North Main street in the Boro. of Shenandoah, County of Schuylkill and State of Pennsylvania for the sum of \$22,000. It was further agreed in said verbal contract that the plaintiff should receive for his services rendered for said defendant in the sale of his aforesaid property, as compensation therefor, a commission of one per cent. which the defendant then and there promised to pay." The plaintiff claims that he obtained two purchasers for the property and that the property was sold to them for the sum of \$21,000 on or about the 16th of July, 1915. Hence he claimed a commission of \$210.00, and the jury found a verdict for said amount. The verdict of the jury settles the question of an existing contract, and the evidence, under our system of jurisprudence, is sufficient to sustain the findings of the jury as to the making of the contract and performance of it on the part of the plaintiff.

It was indisputably shown upon the trial that the defendant had been offered \$19,000 for the property some time prior to the engagement of the plaintiff to sell the property, and that the offer so made was by the same parties who bought it after the plaintiff was engaged to find a purchaser. After Richey was authorized to sell the property, he made ineffectual attempts but could get no offer of \$22,000 and reported the fact to Harfosh. Harfosh then sent him to Nathan Sweet and Max Sweet, stating they had offered him \$19,000 for it. Richey saw Sweets and they said the price was too high, that it would cost a thousand dollars to put a cellar under the building. Having reported this to Harfosh, Harfosh said to the plaintiff, "Go ahead, warm them up; tell them you got a lot of buyers on your hands; they no buy, somebody

else buy." Thereafter plaintiff saw Sweets and urged them to buy the property and told them of others who were considering this property. Seems he made no subsequent report to Harfosh but that Harfosh dealt direct with the Sweets and entered into a contract with them on the 16th day of July, 1915, to sell to them the property in six months, and in accordance with that contract, the property was deeded to the Sweets in January, 1916.

Now the defendant assigns as reasons for a new trial, as follows:

Third. It appearing from the evidence on the part of the plaintiff and from all the evidence in the case, that the purchasers of defendant's property were directly negotiating with, and had made an offer to him of \$19,000 therefor, prior to the time plaintiff alleges his contract was made with defendant, to wit: April, 1915, the plaintiff is only entitled to recover, if at all, at most a commission of one per cent on the purchase price in excess of said sum.

Fourth: Under all the evidence, the plaintiff is not entitled to recover commission on \$19,000."

These points overlook the substance of the contract which was that the plaintiff should receive one per cent of the purchase price then fixed by the defendant at \$22,000. If the property was sold through efforts of the plaintiff which entitled him to any commission at all, he was entitled to a commission upon the price paid and not upon the price that he was authorized to sell at. The property belonged to the vendor and he could change his mind and fix the price at any figure he pleased in order to suit customers brought to him through the efforts of the plaintiff, and if he saw fit to sell to such customers at a less price than he authorized the plaintiff to sell at, he had a legal right to sell at a less price but that does not free him from his liability to pay the plaintiff a percentage on the price received for the property. The law governing such sales is clearly stated in the cases of Gibson's Estate, 161 Pa., 177; Reed's Executors v. Reed, 82 Pa., 420; Keys v. Johnson, 68 Pa., 42; Earp v. Cummins, 54 Pa., 394; Peters v. Holmes, 45 Superior Court, 278 and Lloyd v. Thomas, 50 Pitts. L. J., 212.

The case of Macneir v. Wallace, 252 Pa., 323 which has been urged upon our attention does not control this

case. In that case, the plaintiff had merely suggested to the defendant a possible purchaser of some of its capital stock. The Supreme Court said, "Nowhere in the record does it appear that the plaintiff was the efficient, moving cause of the sale, and unless he was, he did not earn a commission. There was nothing in the agreement giving plaintiff the exclusive right to control the sale of the stock within any specified time. The mere suggestion of the name of a possible purchaser, without more, was enough. Had plaintiff brought the parties together for the purpose of effecting a sale, and if, his introduction or his opening of negotiations, had resulted in a sale, his commission would have been earned; but there is nothing in the evidence to justify that conclusion."

Nathan Sweet, one of the buyers, testified that he had spoken to Harfosh about buying the property before Richey came to see him, but the fact that Richey told him that other people were about to buy the property lead him to hurry to see Harfosh so that other people would not get the property. It would, therefore, seem that Richey's "Warming up" of the Sweets was the efficient cause of the bargain made between Harfosh and the Sweets on the 16th of July, 1915. The Supreme Court said in *Earp v. Cummins*, *supra.*, "Now a real estate broker is the agent of the vendor. There must be an employment to constitute him an agent, and his services as such, however slight, must be the efficient cause of the sale. If the mere introduction of the property to the notice of the buyer effects a sale, the broker earns his commission. An advertisement or any other service is enough, if it be the immediate and efficient cause of the bargain." Under all the evidence, the case was for the jury whose verdict should not be disturbed for any reason that we now know of.

And now, April 30th, 1917, the motion in arrest of judgment and for a new trial is overruled, and the Prothonotary is directed to enter judgment for the amount stated by the jury in its verdict in favor of the plaintiff and against the defendant upon payment of the jury fee.

JOSEPH BRADIGAN, ET AL. v. SCRANTON RAILWAY COMPANY.*Contributory Negligence—Personal Injuries—Street Car—Obvious Danger—Infant.*

Where a boy twelve years of age was struck and injured by a street car while trying to recover from the track a plaything known as a "sling shot," and he testified on the trial that he saw the approaching car, fully realized and calculated upon the risk involved, and would have escaped injury but for an unforeseen slip of his foot, a verdict should be directed for defendant.

The presumption that a boy under the age of fourteen years is incapable of appreciating or avoiding danger has no weight as against his own avowal to the contrary.

To the rule that a party is bound by his own testimony, so far as its import is free from doubt and ambiguity, there is no exception in favor of a plaintiff under the age of fourteen years.

Motion for judgment for defendant on the whole record. In the Court of Common Pleas of Lackawanna County. No. 915, October Term, 1914.

W. B. Landis, for Plaintiffs.

Warren, Knapp, O'Malley & Hill, for Defendant.

Newcomb, J., June 26, 1917. There was a mistrial by reason of disagreement of the jury on the initial question as to how the accident happened out of which the suit arose. This had been formally submitted and further instruction reserved to await the finding on that specific issue. Among other things so reserved was defendant's request for binding instruction, the merits of which form the question now raised by this motion.

Father and minor son sued for damages on account of an injury suffered by the son who was alleged to have been run down on the street by one of defendant's cars.

Their averment was that the boy, then in his twelfth year, was crossing the street and suffered the injury by reason of the excessive speed of the car coupled with the omission of warning by bell or otherwise. Their proof was that the car was going at the speed usual at that place, with which the boy was familiar, not to exceed ten miles an hour, and that at all times with which the case is concerned it was not only in plain sight but he was in fact looking at it and taking special note of its approach. Neither did he claim to have been crossing the street. While the accident occurred near a flagstone crossing—

not one, however, at a street intersection—that fact is without significance. The place of the accident was on East Drinker street, running east and west, in the borough of Dunmore. The railway track is single and laid on the southerly side of the street. The car was east-bound. According to all the adult witnesses—apparently disinterested and unbiased—the accident was the result of the boy's attempt to jump on the car as it passed. The request for binding instruction, however, was based upon his own version of the thing. According to that he went on the track to pick up a plaything under circumstances which would preclude recovery by an adult for his own temerity. The allegation of excessive speed was abandoned at the argument and the contest, therefore, now reduces itself to the narrow inquiry whether the question of the boy's capacity to avoid a manifest peril must be submitted to the jury as a disputable inference of fact notwithstanding his own avowal that he was fully sensible of the danger, had calculated upon it, and would have made good his calculation and escaped the injury but for an unforeseen slip of his foot.

That he is a bright boy is neither disputed nor disputable. On the stand he made it plain that he would resent any imputation to the contrary. He was not without self-assurance and on occasion could make shift to lecture counsel in order to keep him within what he conceived to be the bounds of proper cross-examination.

Being on the southerly sidewalk with three companions, he claimed to have been amusing himself with a sling shot by shooting pebbles at a dog on the opposite side of the street. The car came into view nine hundred feet to the westerly. He noted its approach and the identity of the conductor whom he was at pains to have it understood he well knew because he had traveled on his car "and paid my own way too, many's the time."

He took his last shot after noting that the car was about one hundred and fifty feet distant. What damage was done to the dog, if any, does not appear; but the shot proved to be the undoing of his weapon. The elastic parted company with its fixture and landed on the track near the farther rail. In chief he accounted for his injury in this way: "Q. Did you notice the street car coming when you went out there to get the rubber band?

A. Yes, sir; but I thought I would have lots of time to get over and have the rubber picked up, and if I didn't have slipped I would."

Cross-examined more at length on the point he testified as follows: "Q. And when you got to that point and looked * * * you saw the car coming? A. Yes, sir. Q. And the car was down a little way? A. Yes, sir. Q. And you thought you could get across ahead of the car? A. I thought I would have time to pick up the sling shot. Q. But when you started to cross the track ahead of the car you saw the car coming? A. Yes, I saw it coming when I was at the place and then I shot. Q. * * * And you knew the car was coming then, didn't you? A. Yes, sir. Q. And when your sling shot dropped you thought you could get it and get out before the car could catch you? A. Yes, sir. Q. And you knew if you did not get across in front of it—you knew the car would catch you and injure you, didn't you. A. Yes, sir. Q. And knowing that, you went in to get the sling shot and while you were there your foot slipped? A. Yes, sir."

This describes no thoughtless, heedless act of an impulsive child either unmindful of his surroundings, insensible of the risk he was running, or incapable of appreciating and avoiding it. Taking him at his word, his account of the casualty leaves no debatable question either of his knowledge, presence of mind, or capacity to choose as between the place of safety and that of danger; for his act was one of deliberation done in pursuance of specific calculation as to his ability to escape a conscious peril, which miscarried only through the untimely slip of his foot—a remote chance upon which he had not calculated.

A boy's capacity is the measure of his responsibility; and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to it: *Kelly v. Traction Co.*, 204 Pa. 623. Under the age of fourteen years he is entitled to the benefit of the presumption that he is without capacity. But this, like any other presumption of fact, is rebuttable and that gives rise to the general rule that the defendant in such case assumes the burden of affirmative proof in order to overcome the negative presumption. It follows that where the counter-

vailing proof comes from sources supplied by defendant, or, for that matter, from any source except the mouth of plaintiff himself, it must inevitably be circumstantial and as such would furnish ground only for an inference of the essential fact to be drawn only by the jury.

But that is not this case. The fact of ability and capacity is distinctly avowed here by the plaintiff. Thus the presumption vanishes, and to submit the question of his negligence would be simply to accord the jury the privilege of an arbitrary and unfounded inference to the contrary of plaintiff's unequivocal assertion upon a point whereof he alone can speak decisively. To the rule that a party is bound by his own testimony, so far as its import is free from doubt and ambiguity, there is no exception in favor of a plaintiff under the age of fourteen years.

It is believed that defendant's request for binding instruction should have been affirmed, and the rule for judgment is accordingly made absolute. Let judgment be entered for defendant on the whole record, with exception for plaintiff, sec. leg.

DELP'S SONS v. DE LUCA.

Replevin—Motion for Judgment for Want of Sufficient Affidavit of Defense—Insufficient Averments as to Incorrect Copy of Agreement Filed with Plaintiff's Statement of Claim—Bailments—Contract of Sale—Affidavits upon Information and Belief—Sale of Bailed Property at Sheriff's Sale—Estoppel of Plaintiff to Claim His Property Sold at Sheriff's Sale of Which He Had Notice—Estoppel in Pais.

Where an action of replevin by a bailor to recover his property from a defendant in whose possession it is found, in the affidavit of defense the intervening defendant avers that he is informed and believes and therefore avers that the contract of bailment attached to the plaintiff's statement of claim is not a correct copy of the agreement between the bailor and the bailee but the defendant does not crave oyer of the original agreement and does not undertake to say even on information and belief wherein the copy filed is incorrect nor does it disclose what efforts, if any, the affiant has unavailingly made to inform himself about the contents of the real agreement so that affiant might be able to make a proper affidavit exhibits nothing that would constitute a legal defense.

If a fact be averred upon information and belief the defendant must state that he expects to be able to prove the same or set forth

specially the sources of his information or the facts upon which his belief exists. Neither gossip about facts of whose existence affiant has no personal knowledge nor the fact of affiant's unwarrantably giving credit thereto nor both of these things in conjunction with each other will disclose a case wherein a plaintiff will not be entitled to take judgment for lack of sufficiency in the affidavit of defense.

Affidavits of defense upon information and belief should allege facts definitely and also set forth the sources of the affiant's information and the ground of his belief in such form that the Court may know from what is so stated that a provable defense is alleged to exist and that further proceedings in the case should await a trial wherein its existence may be proven. The procedure in a motion for want of sufficient affidavit of defense is to speed the cause and give a plaintiff judgment at once unless the existence of a defense provable at a trial be disclosed by the affidavit.

Where it is alleged by an intervening defendant that the defendant in the action relied on the plaintiff's reading of the contract of bailment and the explanation thereof to him and that there was no intention on the part of the defendant to rent or hire the goods rather than to buy them, without any averment that the agreement was not correctly read to the defendant and without any allegation of circumstances amounting to fraud, accident or mistake or a contemporaneous explanation outside of its terms, without which it would not have been signed at all, will not have the legal effect of depriving the writing of its evidentiary value as being the exclusive source of ascertaining to what the minds of both the contracting parties must have assented and the averment contained in that clause of the affidavits of defense is sufficient to prevent judgment.

Where a bailee sells or permits the sale of bailed property at a sheriff's sale without the knowledge or consent of the bailor such a transfer passes no title even though the transferee pays full value and has no notice of the bailor's title at the time of the sale, and the bailor may recover the property itself from the vendee in replevin.

Where it is alleged by an intervening defendant that the bailed property was sold at a sheriff's sale as the property of the defendant, the bailee, and that the plaintiff had notice of the said sale and apparently assented to the sale of the goods as being the goods of another without any allegation as to the contents or character of the notice given to the plaintiff, how and upon whom it was served, such defense attempted to be set up is an estoppel designed to conclude the adverse party from showing the truth in respect to his title and in such a case the ultimate facts must be stated with a high degree of precision and completeness for nothing is to be supplied in their favor by intendment or argument or surmise.

To work such an estoppel, it must be shown that the plaintiffs in connection with the sheriff's sale either assented to the making of it or grossly neglected to discharge a duty that they owed to the intervening defendant as a bidder at that sale and that by reason of the non-performance of that duty, affiant had been reasonably induced to become a purchaser, a thing he would not have become but for the inducement that a knowledge of that neglect at the time of purchase afforded him.

The real owner of chattel cannot be charged with an estoppel by the purchaser of such chattel at sheriff's sale where it does not appear that the purchaser acted on or was misled by anything said or omitted by the owner or his agent and the party setting up an estoppel must be personally misled or deceived by the acts which constitute the estoppel alleged.

In every case in which estoppel in pais really appears there will be manifest these things, viz: (1) Misleading conduct or silence on the part of him who sought to be estopped. (2) That he who seeks to set up the estoppel stood in such a relation to him employing the misleading conduct as to be entitled to rely upon it as representing the truth and that he actually did so rely and in consequence of such reliance took action on a false basis that he would not otherwise have taken. (3) That if the party employing that misleading conduct is permitted now to show in a pending trial the truth about the thing to which he had before given a deceptive appearance and upon which appearance the party seeking to set up the estoppel had reasonably relied in taking action the latter would as the result of the pending suit then suffer a loss from having in good faith taken that previous action, and the enforcing of the principles of equitable estoppel will protect him who sets up the estoppel from the consequence of the error into which his adversary has culpably led him without fault on his part.

In the Court of Common Pleas of Westmoreland County. No. 523 May Term, 1916. Motion for judgment for insufficiency in the affidavit of defense filed by Mike Cecero, intervening defendant.

Kester & Fink and F. S. Delp, for Plaintiffs.
William T. Dom, Jr., for Intervening Defendant.

McConnell, J.: On the 29th day of March, 1915, S. Delp's Sons, of Pittsburgh, Pa., entered into a written agreement with one Joseph DeLuca, of Youngwood, Pa., which instrument of writing purported to "let and hire unto the said party of the second part, the following described goods"—(then there is recited in the paper a full description of the goods),—"for 21 months from the date hereof, for the rent or sum of Three hundred dollars, payable," in the manner in said agreement recited. The parties of the first part therein agreed that, if the party of the second part should keep and perform all the covenants made by him in the instrument of writing, and should make no default in the payment of the rentals as they fell due, that they would execute and deliver to the party of the second part, a bill of sale for the goods, the consideration whereof should be one dollar. Among others, this provision is contained in the instrument: "And it is hereby expressly understood and agreed by and between the said parties to this agreement, that no title to the said property, either legal or equitable, shall, under this agreement, vest in the said party of the second part, except as lessee."

The plaintiff, asserting title to the aforesaid goods, and alleging non-compliance with the terms of the agreement by the party of the second part, whereby said second party's right of possession had become forfeited, caused to be issued a writ of replevin for the leased goods, to which writ the sheriff has made the following return: "To the honorable, the judge within named: Replevied, as within command, on the 28th day of March, 1916, at 10.30 o'clock A. M. and, at the same time, summoned the said C. D. Wentzell, landlord, in whose possession the property was found, by handing him a true and attested copy of the within writ, and making known to him the contents thereof. Served the within writ, April 1, 1916, on the within named defendant, Joseph DeLuca, personally, by handing him a true and attested copy of the within writ, and making known to him the contents thereof. Afterwards, delivered the property to Mike Cecero, who was granted permission to intervene, as a party defendant to the cause, and who filed a counter bond. So answers John P. Kilgore, Sheriff."

Mike Cecero alone, of all the parties served, filed an affidavit of defense, and to the sufficiency of this affidavit, exceptions have been filed, and judgment is now sought by the plaintiffs, by reason of the alleged insufficiency of the affidavit.

(1) The first paragraph of the affidavit is as follows: "First. Affiant is informed and believes, and therefore avers, that Exhibit 'A,' attached to the plaintiffs' statement of claim, is not a correct copy of the agreement signed by Joseph De Luca. As affiant does not have the original agreement, and cannot get possession of it, he is, therefore, unable to attach a true and correct copy to this affidavit of defense."

This averment, as will be observed, does not crave oyer of the original agreement, and does not undertake to say, even on information and belief, wherein the copy filed is incorrect, and to thereby disclose the materiality of the alleged variance, nor does it disclose what effort, if any, the affiant has unavailingly made to inform himself about the contents of the agreement signed by Joseph De Luca, so that affiant might be able to make a proper affidavit. Affiant does not pretend to any personal know-

ledge about the matter, it being simply averred that he is "informed and believes, and, therefore avers," and he does not even say—(that which is very material, when a fact is averred only on information and belief,) viz: that he expects to be able to prove a variance between Exhibit "A," and the contract signed by De Luca. This paragraph exhibits nothing that would constitute a legal defense. "An allegation in an affidavit of defense that the defendant had been refused permission to examine certain books, for the purpose of ascertaining the merits of plaintiff's claim, is unavailing to prevent judgment. In such a case, the proper course for the defendant is to show his inability to make an affidavit of defense without such inspection, and to ask for a suspension of the rule for judgment, until an opportunity properly to inform himself is afforded." *Wanner v. The Emanuel's Church*, 174 Pa., 466. "The only proper course for a party who denies that he ever executed the instrument sued on, a copy of which is filed, is to demand inspection of the original, and then deny it was signed by him, or by his authority." *Allen v. National Bank*, 10 W. N. C., 188. "The defendant should have satisfied the Court that he had made diligent efforts to inform himself and had failed, through no fault on his part, and asked for further time; or, if an inspection of books or papers in the possession or control of the plaintiff was necessary, and had been refused by the plaintiff, he should have asked for an indefinite suspension of judgment, till the inspection was allowed." *Lord v. Ocean Bank*, 20 Pa., 384. See also *Leibensperger v. Sav. Bank*, 30 Pa., 531; *Kelly v. Livingston*, 1 W. N., 95.

The averment made in this affidavit, that some undesignated person has informed the affiant that, in some undesignated way, the copy of the agreement filed by plaintiffs is incorrect—and that affiant believes it, affords no basis of defense. The averment of the affidavit fairly implies,—and other paragraphs expressly assert,—the execution of some kind of an agreement at the time De Luca obtained the goods from the plaintiffs, and nothing contained in this paragraph shows any reason why, for the purposes of the motion, Exhibit "A" should not be taken to be a copy of the true agreement between the contracting parties, and we shall so consider it, notwith-

stand this vague averment of affiant with respect to its accuracy.

(2) The second paragraph of the affidavit is as follows: "Second. Affiant is informed and believes and, therefore avers, that the agreement signed by Joseph De Luca for the goods mentioned in plaintiffs' statement of claim, was not a contract of bailment, but was a contract of sale, and that Joseph De Luca became the owner of the goods."

We are unable to tell, with certainty, whether, according to this averment, affiant has been informed that "Exhibit A" is not a contract of bailment, but is one of sale, or whether affiant means to aver that a different agreement from "Exhibit A" was signed by Joseph De Luca, and that that different agreement was one of sale, and not of bailment.

If the former is what is meant, the affiant has been misinformed, and his belief is unwarranted, for "Exhibit A" is a plain instrument of bailment, even although under it, after the bailment terminates, by full compliance, the agreement contemplates the possibility that a sale, on designated terms, may then take place, if that be then desired. The goods are delivered, however, on a contract of bailment immediately operative, and if a subsequent sale should take place—although there was no binding obligation in the agreement that it must take place,—that will not have the effect of presently destroying the bailment, and presently converting it, during its prescribed currency, into a sale, *ex vi termini*. "A bailment is the transfer of possession of personal property, without the transfer of ownership, the personal property being held according to the purpose of the delivery, and to be returned, or delivered over to a third person, when that purpose is accomplished." *Middleton v. Stone*, 111 Pa., 589. An inspection of "Exhibit A" shows that its contents satisfy all the essentials of a bailment, as defined above.

In the case of *Rowe v. Sharp*, 51 Pa., 26, the following facts and conclusions of law appeared: "Sharp, by writing, 'let' to Goff two billiard tables for nine months, Goff to use them at his place of business, pay a certain sum for their use, and, at the end of the term, to redeliver them, and if then Goff had complied with the covenants of the agreement, Sharp was to make him a bill of sale of

the tables, the consideration for which was the sum to be paid for their use. Held, this was a bailment for use of the tables, with provision for sale, in case of payment of the price. Such a contract can be enforced, even against the creditors of the bailee."

In the case of *Crist v. Kleber*, 79 Pa., 290, Kleber leased a piano to Wilson for a rent, payable quarterly; the lease to terminate, at the option of Kleber, if the rent was not paid; with privilege to buy, and, if purchased, all sums paid for rent to be deducted from the price. Kleber still to retain the ownership. The same, being in possession of Wilson, was sold for taxes against him. Held, that the sale did not divest Kleber's ownership.

"A lease of personalty for a term, on monthly payments; with a right to re-enter into possession for default; a bill of sale to be given when all payments have been duly made, is a bailment, and not a conditional sale." *Wertz v. Collender Co.*, 6 Sadler, 361. "If, upon a transfer of chattels, it appears from the contract, that the party receiving possession of the goods is to retain them for a definite period, and if, at or before the expiration of the period, he pays for them, he is to become absolute owner, otherwise to pay for their use, this is but a bailment, and the title to the property, even as against creditors of the bailee, remains in the bailor." Appeal of *Edwards*, 105 Pa., 103. "Where a person receives a chattel for a specified time, and agrees to pay for its use, and, further, to purchase it during, or, at the expiration of said period, the contract is one of bailment, and not of sale. As such a contract does not vest any title in the bailee at the time possession of the chattel is delivered to him thereunder, it is not void, as against his creditors, under the statute of fraudulent conveyances." *Dando v. Foulds*, 105 Pa., 74.

These authorities, and many others of like tenor, that could be cited, will sufficiently show that, if affiant in this case has been informed, and believes, that "Exhibit A" was a sale, and not a bailment, he has been misinformed, and his belief, therefore, rests on an inadequate basis—for "Exhibit A" is a clear instrument of bailment, and not one of sale.

If, on the other hand, we assume that affiant, in this second paragraph, was speaking, not of "Exhibit A," but

of some other unexhibited instrument of writing, differing, in some undesignated way from "Exhibit A," it is equally well manifest, that paragraph two of the affidavit does not state anything that would constitute a defense.

This paragraph only purports to be made on "information and belief," and is not an averment of any personal knowledge of affiant. In such a case, affiant must also aver expectation of ability to prove the facts so averred—for he, himself would not be competent to prove them at the trial—which necessary averment has not been made in this paragraph. Neither gossip about facts, of whose existence affiant has no personal knowledge, nor the fact of affiant's unwarrantably giving credit thereto, nor both these things in conjunction with each other, will disclose a case, wherein a plaintiff will not be entitled to take judgment, for lack of sufficiency in affidavit. "If a fact be averred upon information and belief, the defendant must state that he expects to be able to prove the same, or set forth specially the source of his information, or the facts upon which his belief rests." *Black v. Halstead*, 39 Pa., 64. "Where the defendant cannot state the facts in his affidavit of defense of his own knowledge, he should aver that 'he is informed, believes, and expects to be able to prove them;' it is not an equivalent to aver that he 'has abundant reason to believe.'" *Newbold v. Pennock*, 154 Pa., 591. "If the defense be sworn to on information and belief, the defendant must set forth the ground of his belief." *Wolverton v. Smith*, 4 N. W., 442. "An averment of expectation to be able to prove, or the sources of information, or the facts on which the belief rests, must accompany a statement on information and belief." *Tilli v. Vandergrift*, 18 Sup., 485. *Baum v. Guaranty Co.*, 19 Sup., 23. The source of information; or a detail of any circumstances upon which belief can properly rest, is not disclosed in this paragraph, and the court is, therefore, unable to determine from an inspection of it, whether the averred belief of affiant is reasonably and warrantably entertained or not. This paragraph is also open to the objection before considered in connection with the first paragraph. When a defendant denies that the copy filed by the plaintiff is correct, he must state wherein it is incorrect, or give an

adequate excuse for not being able to do so. The second paragraph discloses no ground for defense.

(3) The third paragraph is too long for full verbal quotation herein. Apropos of the substance of what is contained therein, this can be properly said: The fact that De Luca was educated in the Italian language in Italy, and the fact of his coming to this country when he was nineteen years of age, and the further fact of his never having gone to school in this country, these facts are not the equivalent of explicitly saying that De Luca did not understand English, or that he could not read the instrument signed by him. This paragraph does not say that he could not understand English, and read it also. It does say, however, that he "did not attempt to rely on his knowledge of the agreement which he signed." The law would require him to have done so if he could, for it is for the very purpose of indisputably showing what their knowledge of what their agreement is that a writing is signed by the contracting parties. The averments of this paragraph do not disclose De Luca's inability to be possessed of the knowledge which his signature to the agreement certifies he had. This affiant is, himself, not the person who signed that agreement, and, of course, would not personally know—(being possessed only of information and belief, with respect to facts)—in a way entitling him to testify as to the existence of those facts, at any subsequent trial of the cause in court. He could not testify upon what the actual signatory, at the time of signing, relied. Affiant could only get knowledge of that character through his having been informed by some one who had real knowledge of it. Affiant only says in his affidavit that he is "informed and believes." He does not disclose the source of that information. For aught that appears in the affidavit, De Luca, who alone knows upon what he relied, would testify to no such thing as affiant asserts in the affidavit. The affidavit, to make affiant's assertion of information and belief legally substantial thing, should disclose, in addition, that the thing which, confessedly, was not within affiant's personal knowledge, he expected to be able to prove at the trial. The affidavit does not disturb the presumption that the signing by De Luca imports.

A defense which is not provable, is not one that dis-

entitles a plaintiff to have immediate judgment. Hearsay and belief do not, of themselves, constitute an adequate basis for a defense. There must be something shown in the affidavit that could be an operating factor in the actual trial of the case, otherwise the matter is irrelevant; and, at the trial, affiant could not be allowed to testify only about what he has been informed of, and also believes. The basis of that information and belief must constitute a thing legally provable at the trial, and the affidavit should make that manifest—otherwise it is a vain thing to mention it therein. In the case of *Philadelphia v. Pierson*, 211 Pa., 388; Mr. Justice Brown, at page 391, says: "An affidavit of defense is good only when it contains averments which, if proved at the trial, would be a defense to the plaintiff's claim. An offer to prove that this appellant had been informed that the bond of indemnity had not been approved would hardly be made by counsel, on a trial of the cause, and if made, would be promptly overruled by any court to which it might be made, for it would be no proof that the bond had not been approved." It is equally clear that affiant would not be allowed to prove at the trial, simply that he had been informed and believed. "In civil cases, whenever evidence of the motive or intent with which an act was done is relevant, the direct testimony of the actors is admissible, although, of course, not conclusive evidence of such motive or intent. But a witness will not be permitted to testify as to the motive or intent of another." 11 Ency. Law 507 and 508. *Manufacturers and Traders Bank v. Koch*, 105 N. Y., 630, 12 N. E. 9. "It is inadmissible for the grantor's husband to testify as to her intentions in making a certain plot exhibiting a private alley. Only her acts and declarations are admissible, from which her intentions can be inferred." *Chick v. Kluger*, 117 Ill., 643, 7 N. E., 111.

In this case, in view of the fact that affiant only professes to speak from information and belief, and in view of the fact that affiant is incompetent to directly declare, as a witness, upon what De Luca relied when he signed an agreement, and what he understood, and what he did not understand, or to declare directly any other operation of De Luca's mind, in view of all these things, it is doubly important that it be shown, by express averment in the

affidavit of defense, that the information and belief of affiant were with respect to the very things which the affiant expected to be able to prove at the trial. What De Luca relied upon, and what he did not rely upon, would be things which, in their essential nature, would be directly unknowable to affiant except through information—a mode of acquiring knowledge that would necessarily exclude affiant from disclosing it as competent evidence of the facts, on the witness stand, at the trial of the cause. Unless those facts can be proven otherwise than by the testimony of the affiant who sets up this defense, they are not provable at all, and it is incumbent on the affiant, when he files an affidavit of defense, both to know that there is a provable defense, and also to state that fact in the affidavit in such a form that the court may know, from what is stated in the affidavit, that a provable defense is alleged to exist, and that further proceedings in the case should await a trial wherein its existence may be proved. The procedure, in a motion of this kind, is to speed the cause, and to give a plaintiff a judgment at once, unless the existence of a defense, provable at a trial, be disclosed by the affidavit. "Affidavits upon information and belief should allege facts definitely, and also set forth the sources of the affiant's information, and the grounds of his belief, to enable the judicial mind to determine whether the belief is well, or ill, founded." 1 Ruling Case Law, 772, sec. 18.

If, as is somewhat vaguely averred, "the plaintiffs explained to him, (i. e. De Luca), that the goods were to be his as soon as paid for" is but a statement of a possibility that "Exhibit A" undoubtedly contemplates, if it does not unconditionally provide for it. The explanation, if made as averred, would not be so substantially variant from the provisions of "Exhibit A," as to be evidentiary of any designed fraud, even if De Luca himself were to make the averment that the explanation had been given, instead of Cecero, who does not pretend to have any personal knowledge about the giving of the alleged explanation. This quoted clause does not say that plaintiffs did not read the signed agreement correctly, but makes complaint only about an alleged "explanation," given outside of the reading of the agreement's terms. Affiant says that De Luca "relied on the plaintiff's reading the said

agreement and the explanation thereof to him, and that there was no intention on the part of Joseph De Luca to rent or hire any goods," etc. It does not appear from this, that the agreement was read incorrectly, but it does appear that it was read, and it does appear that DeLuca relied both on the reading, and on the explanation. Complaint is made of the "explanation" alone, in these words: "The plaintiffs did not explain to him, the said Joseph De Luca, that there was anything in the agreement about his returning the goods, or that they could take possession of them, upon his making default in any of the payments, that the plaintiffs did not explain to him that he was only renting or hiring the goods, but explained to him that he was purchasing the goods; that the prices fixed in the agreement, to wit: \$300.00 was the full value of all the goods mentioned in the agreement, and was not the price fixed for the rent or hire of the same, but was the prices fixed for the sale and purchase of the goods, and that this was so understood by Joseph De Luca from an explanation of the said agreement to him."

If the agreement was read to De Luca, and the affidavit impliedly declares that it was, De Luca would hear from that reading that the agreement "Witnesseth that the said party of the first part doth hereby let and hire unto the said party of the second part, the following described goods viz: * * * for 21 months from the date hereof, and for the rent or sum of three hundred dollars, payable as follows, viz: one hundred dollars to be paid, at or before, the delivery of the above described property, said payment being for the first month's hire, and the residue, amounting to two hundred dollars in 20 payments of ten dollars each, on the 29th day of each and every consecutive month hereafter, during the time mentioned in this agreement or any extension thereof. * * * Provided, however, that the entry of judgment against said party of the second part under the foregoing clause of this agreement shall not be construed to deprive the said party of the first part of the ownership of said goods, or from pursuing any other lawful method to collect said rent, nor from taking possession of said goods.

The said party of the first part hereby further promises and agrees that if the said party, his heirs, adminis-

trators or assigns shall well and truly keep the covenants herein made, and shall make no default in any one or more of the installments of hire aforesaid, as the same shall fall due and payable, and this agreement shall not be sooner determined by mutual consent or otherwise, that it will execute and deliver to the said party of the second part, his heirs, administrators and assigns, a bill of sale for said goods, the consideration whereof shall be one dollar.

And it is hereby expressly understood and agreed, by and between the said parties to this agreement, that no title to the said property, either legal or equitable, shall, under this agreement, vest in the said party of the second part, except as lessee."

That is something that is in the agreement. It is something that needs no "explanation" and admits of none, something that no "explanation" can alter to what affiant says De Luca believed. It was the agreement De Luca signed—not something else—and he is presumed to have signed it for the purpose of making it the exclusive evidence of what the contract was, unless that presumption is overthrown by more substantial considerations than what a third person has been informed of and believes but is unable to testify to, and does not assert that what he has been informed of is legally provable at all. Having heard it read, and having then signed, he cannot say, and no person speaking solely in his right can say the agreement was something that was in the "explanation" and not in the writing, and thereby escaped the obligation of the writing. The affidavit does not say that De Luca did not sign this agreement, or that it was signed only in reliance upon a contemporaneous explanation, outside of its terms, without which, it would not have been signed at all. In the absence of an averment of that kind, and in the absence of any precise and express averment of fraud, accident or mistake with respect to the signing of "Exhibit A," what De Luca must have understood and agreed to is determinable from an inspection of the paper to which he, without denial in the affidavit, has placed his signature. If that was not his agreement, what was it? If "Exhibit A" were to be reformed to correspond to what the affidavit alleges De Luca understood it to be, what would its then-form be?

It would be impossible for us to know from the contents of this affidavit. If a correct reading was given—and in the absence of an averment to the contrary, we must assume that it was—a sufficient affidavit of defense will, with precision, aver the exceptional circumstances that will have the legal effect of depriving the writing of its evidentiary value, as being the exclusive source of ascertaining to what the minds of both the contracting parties must have assented. Under ordinary circumstances, the writing is to be looked at as being the only source from which to ascertain, not what one of the signatories might possibly have meant, but what both of the signatories must have meant in view of the terms they have jointly employed to express their meaning. No defense is exhibited by the averments exhibited of the third paragraph.

(4) The fourth paragraph avers that affiant purchased the goods at a sheriff's sale of them as the property of Joseph De Luca, and, at the time of so purchasing, affiant had no knowledge of any agreement between plaintiffs and De Luca. He does not state who had recovered a judgment against De Luca, and issued the execution upon which they were sold to affiant, as is alleged. That judgment and execution constitute steps essential to a showing of the nature and source of affiant's asserted title. Yet they are not given. If the averment of plaintiffs' brief be correct, it was Cecero himself who issued the execution and was proceeding to sell them before he could possibly have had any information of De Luca's giving any notice to plaintiffs that they were about to be sold by the sheriff.

In this State, there is no such thing as market overt. Possession as a bailee is not at all an infrequent basis for the right of possession of personal property. Mere possession does not, of itself, legally imply ownership. The rule of caveat emptor applies.

"Property in the hands of a bailee is not liable to execution at the hands of the bailee's creditors. A sale by a sheriff under such an execution passes no title, and the bailor may recover the property from the sheriff's vendee." *Crist v. Kleber*, 70 Pa., 290. 2 *Pepper & Lewis Digest of Decisions*, 2000, gives this summary of the import of numerous cases cited: "Where the bailee sells

or pledges the property to a third person, without the knowledge or consent of the bailor, such a transfer passes no title, even though the transferee pays full value and has no notice of the bailor's title at the time of the transfer; and the bailor may recover the property itself from the vendee or pledges in replevin, or, upon the taker's refusal to deliver the property upon demand, may recover its value in trover." That is a fair summary of the cases cited. The cases are as follows: *Gallagher v. Cohen*, 1 Brown, 43. *McMahon v. Sloan*, 12 Pa., 229, *Hildeburn v. Nathans*, 1 Phila., 567; *Rowe v. Sharp*, 51 Pa., 26; *Quinn v. Davis*, 78 Pa., 15; *Mann v. English*, 7 C. C. 637; *Miller v. Piano Co.*, 155 Pa. 208. In the case last mentioned, the Court, *inter alia*, said: "The general rule is that one can not make to his vendee a good title to articles that he does not own. * * * A bailment for hire makes it possible for a dishonest bailee to sell the goods to an innocent purchaser, but such sale will not pass the title of the bailor, for he has done or omitted nothing that should estop him from asserting his ownership of the goods. The contract of bailment made it necessary to give possession of the thing bailed to the bailee, for the special and temporary purposes of the bailment, but the title remained in the owner." "Where chattels are leased, with an option to buy, the purchasers of the bailed property upon execution against the bailee, do not acquire the option to purchase." 6 *Corpus Juris*, sec. 108. *Cobb v. Deitchess*, 7 Sup. 253. "It is a long and well settled principle of the common law, and indeed of all jurisprudence, that the title of the buyer is limited by that of the seller, and that the process of transferring a defective and still more, a void title, from hand to hand, cannot render it a good title." *Hildeman v. Mathias*, 1 Phila., 567. These principles are exemplified in numerous cases in this State, as well as in all other States. The general rule is thus expressed, in 6 *Corpus Juris*, sec. 35, pp. 1106 and 1107: "After the creation of a bailment, the bailor retains the general title to, or property in, the subject-matter of the bailment, which is not affected, in any way, by unauthorized acts of the bailee, or, in general, by his mere possession as bailee of the subject-matter, for any length of time. The bailor may accordingly assert his title, not only as bailee, but also as against creditors of the bailee,

and as against those claiming an interest in the property through an unauthorized sale, mortgage, pledge, or other attempted transfer of the property, or any interest therein by the bailee."

In short, the bailor's title cannot be lost by the act of the bailee, in attempting, without right, to transfer it, or by any judicial sale of the subject-matter of the bailment, as being the property of the bailee, even though the purchaser of the thing thus wrongfully sold became such in good faith, and for a valuable consideration. It follows that this fourth paragraph of the affidavit of defense embodies no statement of a valid defense.

"The affidavit, where it is admitted that the title was originally in the plaintiff, the affidavit of defense by a party intervening must aver sufficient facts to justify his retention of the property, and show, not only how the plaintiff lost title, but how the person from whom he purchased acquired title, and that he was not a bailee or trespasser." *National Cash Reg. Co. v. Ryder*, 22 Dist., 119. Indeed that is substantially what the Act of Assembly relating to replevin, by its express terms, requires. This fourth paragraph of the affidavit will not withstand that test.

The transaction between plaintiffs and De Luca being a bailment, it remains so, despite anything shown in this paragraph, and the bailor's rights may be vindicated by the form of action employed in this case.

5. Does the fifth paragraph show that, under the law, as between the plaintiffs and the intervening defendant, the plaintiffs are estopped from setting up the truth with respect to their title to the property embraced in this proceeding? That is the question to be dealt with, in view of what this fifth paragraph sets up. In order that we may not seem to overlook anything contained in it, we will here quote that paragraph at length: "Fifth: Affiant further avers that the plaintiffs were, on or about the 3d day of January, 1916, notified by Joseph De Luca, that the said goods, or property, had been levied on by the sheriff of Westmoreland county on said writ of execution, and were about to be sold by the sheriff on the said writ on the 6th day of January, 1916, and that he also gave them the name of the plaintiff in the execution, the place of his residence, and his post-office address, that notwith-

standing the said notice to the said plaintiffs of the said sheriff's sale, the said plaintiffs did not give any notice at the sheriff sale on January 6, 1916, of the agreement alleged in the plaintiffs' statement of claim to have been executed by Joseph De Luca, or that they had any claim of any kind to the goods or property sold by the sheriff on said execution on said date."

It will be observed, (1) that this paragraph of the affidavit does not specifically say that the plaintiffs had been notified by De Luca that the goods, which they themselves were the owners of, had been levied on, and were about to be sold by the sheriff, not as being the plaintiffs' goods, but as being the goods of De Luca himself, who, as is alleged, gave the notice, and that such execution was for the satisfaction of a judgment against De Luca alone. The mode of giving notice is not described, and, though the plaintiffs are described as being partners, yet the affidavit does not state whether the notice was given to one, or both partners, or to some one else in their behalf. The part of defendant's case which is depended upon to put plaintiffs in a position of "standing by," and apparently assenting to the sale of these goods as being the goods of another, should be stated with a higher degree of certainty than is shown on that point in this affidavit. We are entitled to know exactly what the notice was, how, and upon whom, it was served, to the end that we may be informed as to whether affiant's conclusions of law that plaintiffs had notice is correctly drawn or not. It was not affiant who gave the notice, nor does affiant say when he himself had learned that a notice to the plaintiffs had been given—whether before or after, the sale at which he became the purchaser. Affiant does not state that the knowledge on his part was acquired on "information and belief"—as he should do, if the fact, when it transpired, was not within his personal knowledge—and, on the other hand, if he had personal knowledge of the fact at the time it transpired, so that he could, in the form employed in the affidavit, state what De Luca had done, then affiant, before the sale did have such knowledge plaintiffs' claim that should, at least, have put him upon inquiry, as to whether the plaintiffs, and not De Luca, had title to the property. It is not said that any copy of either the writ of execution, or of the

levy made by the sheriff, had been served on the plaintiffs, wherefrom, by a perusal thereof, the plaintiffs would have been informed that the goods had been levied on, as being the goods of another, and for the proper debt of that other. What the plaintiffs should have done if they themselves had been only informed that some one, known to them not to be their creditor at all, was about to sell their goods, is one thing—and what they should have done if informed that their goods were about to be sold as being the goods of another, and for the satisfaction of a judgment against that other alone—may be quite a different thing. “Where the property of one man is wrongfully taken and sold by another in his own name, and for his own benefit, the mere silence of the owner for a period short of the time prescribed in the statute of limitations will not estop him from setting up claim to the property where it does not appear that the purchaser relied upon the owner’s silence.” *Hamlin v. Sears*, 82 N. Y., 327.

On the very important question of what the form and contents of the notice given by De Luca were, and the manner of its service was, we must, under this affidavit, be satisfied with an averment that does not purport to speak with precision as to the form and terms of the notice, or of the manner of giving notice to the plaintiffs, but is only, largely, the apparent expression of affiant’s opinion and conclusion about the significance of the actual, but unstated, facts, of which, it does not distinctly appear, that he had any personal knowledge at all, when they transpired.

What kind of a notice was it—oral or written? On whom, and by what means, was it served? If the notice was in writing, why is the writing not given; if the notice was oral, why are not the precise terms thereof stated, so that the Court might be able to ascertain whether affiant was drawing correct inferences and conclusions therefrom? The defendant, who is an intervener, and not an original party to the bailment, has no better defense to plaintiffs’ claim than the bailee himself would have had, unless he shows specifically and distinctly that plaintiffs had been given such a form of notice as made it their duty to give the notice of their title at the sale, which the affidavit alleges was not there given by them. Where precision, accuracy, and completeness, are properly de-

mandable in an affidavit of defense, we have, in this affidavit, the lack thereof. Under the replevin law the affidavit of defense is not only a showing of a defense, but is also a pleading, whereby the issues are to be defined,—and where the defense attempted to be set up is an estoppel designed to preclude the adverse party from showing the truth, in respect to his title, the ultimate facts should be stated, and with a high degree of precision and completeness, for nothing is to be supplied in their favor, by intendment, or argument, or surmise: “No estoppel is to be taken by inference, or argument, but must be a precise affirmation of that which makes it.” *Field’s Estate*, 2 Rawle, 357. “Where an estoppel is relied upon, it must be pleaded with particularity and precision; in such plea, nothing can be supplied by inference or intendment, and, where the matter relied on is not thus specially alleged, it will be no estoppel. The estoppel must be pleaded fully and sufficiently in all respects. In short, an estoppel must be certain to every intent.” 8 *Ency. Pl. and Pr.* pp. 9 and 10. “Before an estoppel can be raised, there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference.” 16 *Cyc.*, 748.

As stated above, this paragraph of affiant’s affidavit does not state how he came to have knowledge of what De Luca had done with respect to giving notice to plaintiffs, alleged to have been done at a time when affiant had no interest in the chattels. It is not DeLuca who makes the affidavit, but Cecero, who was not the alleged actor in giving the notice. If the affiant was cognizant of the specific facts, and the details thereof, at the time the notice was given, why are these details not given? If he only subsequently came to a knowledge of them, when did he get that knowledge, and why does he not say in the affidavit that the averment is based on information, which affiant verily believes and expects to be able to prove at the trial of the cause? In that aspect of fact, the time when affiant received knowledge that De Luca had given the notice is of vital importance, for, if it was before affiant became the purchaser at the sale, he could not well be considered a purchaser, without notice of plaintiffs’ ownership, for, with that knowledge, he would be put upon inquiry as to ownership. He does not say

that De Luca ever asserted that he was the owner. He does not say that the plaintiffs, the sheriff, or any one else, ever told him De Luca was the owner, and the fact that the goods were in De Luca's possession—if that be a fact at all—and affiant bought them at the sheriff's sale when they were sold as being De Luca's goods—that fact unqualified and unsupplemented otherwise, will not give him any title, other than such title as De Luca himself had,—and personally had the right to transfer—for a sheriff's sale is not a market overt. The rule of caveat emptor ordinarily applies to such sales. To affect plaintiffs' title to the goods, or any of their legal rights incidental to such title, more than this must be shown. It must be shown that these plaintiffs, in connection with that sale, either assented to the making of it, or grossly neglected to discharge a duty that they owed to this affiant as a bidder at that sale and that, by reason of the non-performance of that duty, the affiant had been reasonably induced to become a purchaser—a thing he would not have become, but for the inducement that a knowledge of that neglect at the time of purchase, afforded him. If there is anything added to the ordinary legal effect of the judicial sale, the only instrumentality alleged that is to make that addition to it, is this provision about the notice to the plaintiffs. Omit that, and, clearly, no estoppel is averred. If what it contains does not, with clearness, precision, and certainty, show that, in the plaintiffs' neglected duty to affiant, is to be found a proximate cause and motive for affiant's becoming a purchaser, and, thereby placing himself in a position to suffer loss, if plaintiffs are now permitted to show that they, and not De Luca, are the owners of the goods purchased—I say, if what this averment with respect to notice to the plaintiffs contains does not show the duty to defendant, its neglect by the plaintiffs, and that affiant stands in such a relation to the consequences of that neglect, as to suffer injury innocently,—if the plaintiffs are now allowed to show a title that would overthrow the one they had, by their previous conduct, and induced the defendant to invest money on—then it is idle to contend that the basis of an estoppel is shown. Because of the materiality of this averment about notice to show the existence of the ground of estoppel, it is reasonable to de-

mand,—as the law does demand,—a higher degree of precision than this affidavit exhibits, to the end, that it may be possible for a court to know that there is a defense on the ground of estoppel.

But, in this connection, we may also properly consider what affiant's counsel contend for, and have asked the Court to consider and act upon, as that contention is set out in their brief of argument, for presumably, the affidavit was prepared by counsel, and they are, therefore, advised about what affiant attempted to set up, or, at least, they have the right to determine for the defendant his legal attitude toward the issues involved in this case. Affiant's counsel, in their brief, make certain that which is not determinable with certainty, solely from an inspection of the affidavit itself, viz: that the averment about the notice to plaintiffs is not based at all on affiant's personal knowledge of the facts pertinent thereto, as they transpired, but only on information. The statement of the brief is with a view to avoid being impaled by the proposition that, if affiant recited his own personal knowledge about the notice—as the words of the affidavit on their face would seem to imply—then that knowledge attended him, when he purchased at the sale, and apprised him of plaintiffs' claim of ownership, and thus made it impossible that he should be an innocent purchaser. The brief, among other things, says this: "As we understand it, counsel for plaintiffs admitted that such notice to the plaintiffs would estop them from claiming the property in the hands of an innocent person at sheriff's sale, but argued that the averment in the affidavit of defense was not upon information received and that Cicero, making this averment of his own knowledge, must have known it at the time of the sale. There was no intention on the part of Mike Cicero to make this averment, except upon information received, and we submit that there is nothing in the affidavit of defense, from which any inference can be drawn, that, at the time of the sheriff's sale, Mike Cicero knew of this notice to the plaintiffs," etc., etc. Accepting this statement of affiant's counsel to be correct,—as it doubtless is, although not ascertainable with certainty from an inspection of the affidavit alone—it, however, shows that the affidavit does not contain that which affiant is obliged to

insert therein, when an averment is made, not on affiant's personal knowledge, but upon information, viz: that affiant is informed, believes, and expects to be able to prove at the trial the facts therein alleged about the notice and its service—giving also the date when the information came to affiant—whether before or after the sale—and the source of that information. The authorities heretofore cited on that point are sufficient to justify this statement of what is legally essential.

The terms of the affidavit, however, do not vary from what they would be, if the affiant were stating his own personal knowledge about the matter. It states: "Affiant further avers that the plaintiffs were on or about the 3d day of January, 1916, notified by Joseph De Luca, that the said goods or property had been levied on by the sheriff," etc., etc. This is a form of statement in the affidavit, which would be proper, if affiant, of his own knowledge, knew the facts but improper, if he was only stating information. It has been judicially stated, in *Leigh v. Green*, 90 N. W., 255, that "an unqualified statement of that which one does not know to be true, is equivalent to a statement of that which he knows to be false." Without putting so harsh a construction on what affiant's counsel say the facts were, with respect to this matter and regarding the averment to be, not a statement of personally known facts, but merely a recital of information received by affiant from some undisclosed source,—and which affiant only sought to sketch in historically—the affidavit is, for reasons already given, fatally defective and insufficient. Affiant, in striving to avoid Scylla, falls a victim to Carybdis.

(2) Without further considering these uncertainties and defects pertinent to the question of an estoppel, attention is directed to another part of the paragraph—or rather to what is lacking in another part of the paragraph, in order that it might be a statement of what is essential to the existence of an estoppel in pais. Our question, on a motion of this kind, is not with respect to evidence, and what facts shown would sufficiently show an estoppel—but with respect to whether the defendant's affidavit—which, by statute, is made a pleading in the case,—if sustained by proof showing what is averred therein, and no more, would show the existence of an

estoppel, in favor of the defendant, and against the plaintiffs, that would preclude the latter from showing at a trial that they have title to the goods, and, in consequence, that De Luca could not have any title, that could be transferred to the defendant as a purchaser at a judicial sale. When an issue is made by a defendant in the pleadings, with respect to the existence of an estoppel against plaintiffs, the evidence that may be introduced by him who alleges the estoppel, is not with a view to thereby disprove the things averred in the plaintiffs' statement, and show them to be false, but is only to preclude the plaintiffs from showing, at the trial, and having the benefit of their ownership, as it is therein averred, and which is tacitly now admitted to be true—and this precluding of the plaintiffs showing the truth, is because plaintiffs, by their previous conduct, had reasonably induced the defendant to believe in the existence of a different state of facts—which—though now known to be false—had nevertheless previously induced the defendant to base such action upon it, that would now not be retraceable, and would entail substantial loss on the defendant, if the consequences of a showing of the truth about the title were to be made operative at a trial. "An estoppel operates to hold one to facts as he alleges them, although false; and not for the purpose of proving the facts different from the statement." *Keating v. Orne*, 77 Pa., 89.

If the defendant were to prevail in his contention about the estoppel, in a strict sense, he would not get a "title" to the goods at the sheriff's sale, and the plaintiffs, strictly speaking, would not lose their "legal title" thereto, but they would, while retaining a legal title as to every one else, be precluded from asserting it, as against this particular defendant, because they had, by previous act, misled him and thereby induced action by him. An estoppel does not operate in favor of the whole world, but only in favor of one who has been misled, and induced to take action on the basis of his adversary's words or conduct when he, who asserts the estoppel, did not have other means of verifying what he reasonably believed from such false words or conduct, and acted upon his belief. "An estoppel in pais does not operate in favor of everybody. In general, it operates only in favor of a person for whom it was intended, and who has been misled to his

injury; and he only can set it up." *National Cash Register Co., v. Shurber*, 41 Sup., 187.

If there was no one misled, no matter what the plaintiffs' words or conduct may have been, there will be no estoppel. Until such words or conduct have taken effect on the mind of another, and induced action on his part which would not have been taken but for such inducement, there will be no estoppel. If this be correct, then we cannot determine the question of whether there is an estoppel, by looking alone at plaintiffs' conduct, for that conduct, as an operating cause, must also be traced to an effect on, and an action by, him who sets up the estoppel. The consequences of an estoppel are not visited on plaintiffs as a punishment for their conduct considered as a thing by itself, as a criminal court might, in the interest of the people of the commonwealth at large, impose a fine, or other punishment for a misdeed, but they are only imposed on them to protect a particular individual from the injurious consequences of having been misled by the words, conduct or silence of plaintiffs which the individual asserting the estoppel has reasonably relied upon and based action on, without, at the time, having other knowledge that the thing relied upon was false, but which has—since action taken by him—been made to appear, or can be made to appear to be so. The injury which such a misled person is entitled to be protected against, would befall him, if the plaintiffs are now permitted to avail themselves of the truth in respect to their title, and to have the benefit incidental thereto. In every case of estoppel, there is implied error, on the part of him who sets up the estoppel—and fault, on the part of him who is sought to be estopped. "No one can set up an estoppel who was not affected by the act which contributes the estoppel." *Miles v. Miles*, 8 W. & S., 135. "The real owner of a chattel cannot be charged with an estoppel by the purchaser of a chattel, where it does not appear that the purchaser acted on, or was misled by, anything said or omitted by the owner, or his agent." *Martin v. Strong*, 35 Sup. 635. "Acts do not amount to an estoppel which do not induce belief contrary to the truth." *Silliman v. Whitmer*, 11 Sup. 243. "Matters, which are no inducement to the act done, are not a basis for an estoppel." *Erb v. Brown*, 69 Pa., 216. "No

estoppel in pais can be created, except by conduct which the setting up the estoppel has the right to, and does, in fact, rely upon." *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S., 12, 30 L. ed. 923. "A party setting up an estoppel must be personally misled or deceived by the acts which constitute the estoppel alleged; he must have trusted to them, in some particular business transaction." 2 Herman on Estoppel, 1477.

It will be observed, in the second place that this paragraph does not aver that a knowledge of the fact that De Luca had notified the plaintiffs of the sheriff's sale, and that plaintiffs had not given a notice at the sale of their ownership after having been so notified, had anything, whatever, to do with his own act of becoming a purchaser. He does not allege that any reliance upon or any knowledge of that act or neglect by plaintiffs prompted his own act of becoming a purchaser. If the defendant did not in fact know, at and before, he became a purchaser at the sale, that De Luca had, before notified plaintiffs of the sale, and that they had, nevertheless, neglected, after being so apprised, to give a notice of their title at the sheriff's sale—if he was not then cognizant, I repeat, of that fact, it could not have been operative in prompting him to purchase, and, therefore, could not have been the inducing cause of his action. As stated before, the only thing depended upon in the affidavit, to give the judicial sale any power to affect plaintiffs' property-right, is this added allegation about De Luca having given a notice of the sale, etc., but that fact is not therein traced to any effect on the defendant, which resulted in his becoming a purchaser, and that, but for that fact relied upon at the time of purchase, he would not have purchased at all, and, therefore, would not have been misled. If we assume that De Luca gave a proper notice, (and that is not properly shown,)—we cannot further assume, without its being so averred, that affiant had knowledge of it at the time of sale, and relied upon it, and was thereby induced to make a purchase that, otherwise, he would not have done. To assume that would be to assume the whole substance of what must appear, to show that he was so misled by the plaintiffs' act, as to entitle him to make the application of the doctrine of equitable estoppel as a mode of protection against the injurious consequences of

the error which the plaintiffs are alleged to have induced him to commit. It must appear that what the plaintiffs refrained from doing operated on the mind of affiant and prompted him to believe that plaintiffs, either had no title, or, by silence, they were assenting to the goods being sold as being the goods of De Luca—and that reasonably relying on a belief, so produced by plaintiffs' conduct, affiant had become a purchaser—a thing he would not have done, but for that inducement. A thing of so much importance must not be assumed—it must be distinctly pleaded. This consequence not appearing in the defendant's affidavit, which is his sole pleading, the requisites of an estoppel do not appear therein—and no issue with respect to an estoppel is brought into the case for a decision. The matter asserted about a notice to the plaintiffs then becomes a matter irrelevant to any defense.

In the case of *Sensinger v. Boyer*, 153 Pa., 628, Mr. Justice Williams, on page 632, says: "There is no doubt about the general principle on which the doctrine of estoppel rests. Having induced action by another, on a belief in a given state of facts, it is unjust to permit him who induced the action to deny the facts and strip the action of the protection which they would have afforded. But one who has not been misled cannot invoke this doctrine in his behalf. * * * The rule is that one shall be estopped from alleging the truth, only, when his falsehood, or his silence, has induced action by the other party, that would lead to loss, except for the estoppel." In 10 *Ruling Case Law*, page 697, section 25, this is said: "The final element of an equitable estoppel is, that the person claiming it must have been misled into such action, that he will suffer injury, if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position, in such a way, that he will be injured, if the other person is not held to the representation, or attitude, on which the estoppel is predicated." Substantially the same thing is said, in 11 *Ency. of Law*, pages 437 and 438: "Another essential element of estoppel by misrepresentation or concealment is, that one party should have relied upon the conduct of the other, and have been induced by it to act or refrain from acting, so that he will be substantially injured, if the other party is allowed to repudiate his action, and this rule applies

as well where the conduct of the party to be estopped consists of silence, as where it consists of positive acts." In support of the proposition numerous cases are cited in the foot note. "There is no estoppel, unless there be proof that the party had knowledge of the acts or sayings, and relied on them, and not on his own judgment uninfluenced by them." *McCune v. McMichael*, 29 Ga., 312. In *Commonwealth v. Moltz*, 10 Pa., 527, it is said with respect to the essentials of an equitable estoppel: "To the constitution of this species of estoppel, at least three ingredients seem to be necessary. First: misrepresentation, or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what, otherwise, he would not have done; and, thirdly, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively." *Bigelow on Estoppel*, page 638, says: "The rule is fundamental that, unless the representation of the party to be estopped has also been acted upon—the other party acting differently—that is to say from the way he would otherwise have acted—so that to deny the representation would prejudice him—no estoppel arises."

In this case the act of alleged estoppel by the plaintiffs, be it silence, or negligence, or what not, is not alleged to have been productive of any action whatever by the defendant. This is the omission of what is fundamentally essential to an estoppel. No estoppel arises out of the facts as stated in this affidavit of defense.

If it be alleged that plaintiffs' fault was negligence, and omission to take proper action after having been notified beforehand, of the sheriff's sale, no damage is averred to have come to affiant from such neglect. "Negligence which will work an estoppel against reclaiming property, must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself." *Herron v. Gray*, 168 Mass., 573, 47 N. E. 429. "The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake." Per *Blackburn* in *Swan v. North British Australasian Co.*, 2 Hurlb't & C., 181. Tested on that basis, the defendant's affidavit does not allege the essentials of an estoppel.

If it be argued that plaintiffs' fault was in keeping silence at the sale, or in not attending the sale for the purpose of giving notice of title, after having been informed beforehand of it, the affidavit does not allege that any harmful result came to affiant in consequence of such absence or such silence. It does not appear that plaintiffs' silence, under these circumstances, was known to affiant, at the time he became a purchaser, or if known, that it had any influence whatever in inducing him to become a purchaser. Testing the affidavit on that proposition, the indispensable requisites of an estoppel in pais do not appear. In short, no estoppel is raised in this case by the affidavit.

There have been given by the courts thousands of definitions and descriptions of equitable estoppel, but none of them, on examination, will be found to exclude, as a non-essential ingredient, the effect of the misconduct, or silence of the party to be estopped upon him who sets up the estoppel, and the further fact that he has taken action, in reliance upon the truth of what the other party's conduct or silence, imported. In every case in which estoppel in pais really appears, there will be manifest these things, viz: (1) Misleading conduct or silence, on the part of him who is sought to be estopped. (2) That he who seeks to set up the estoppel stood in such a relation to him employing the misleading conduct, as to be entitled to rely upon it, as representing the truth, and that he actually did so rely, and, in consequence of such reliance, took action on a false basis, that he would not otherwise have taken. (3) That, if the party employing that misleading conduct is permitted now to show, in a pending trial, the truth about the thing to which he had before given a deceptive appearance, and, upon which appearance, the party seeking to set up the estoppel had reasonably relied in taking action, the latter would, as the result of the pending suit, then suffer a loss, from having, in good faith, taken that previous action—and the enforcing of the principles of equitable estoppel will protect him who sets up the estoppel from the consequences of the error into which his adversary has culpably led him, without fault on his part.

The purpose and end aimed at, in the application of the doctrine of equitable estoppel, is to protect one who

shows that he stood in such relation to the facts alleged to have caused the estoppel, as to have reasonably relied upon them, without knowledge of their falsity, and to have based such action upon his faith in them, that he would sustain substantial loss, if the party who misled him is permitted, in an action now pending between them to show the truth, instead of the fiction upon which he had induced the other party to rely. Unless he who seeks the application of the doctrine of estoppel shows that he is so circumstanced, he fails to show any basis for the application of the doctrine. In that respect, this defendant has failed. This affidavit is entirely silent with respect to whether the plaintiffs' conduct, as referred to in the affidavit, had been productive of effect in affiant's situation, so as to entitle him to the form of protection which he craves. We repeat, in the language of the Court, in the case of *Hann v. Martin*, 86 Pac., 371: "Where an estoppel is relied on, the facts constituting it must be pleaded with particularity, and it must be alleged that the party setting up estoppel relied on the facts, believing them to be true, and will be prejudiced, by allowing them to be disproved." That has not been done here, and we are not permitted to find what is essential to an estoppel, by resort to argument, or inference. "An answer setting up an estoppel by conduct must show that defendant relied on plaintiff's representations or conduct, and was influenced thereby and was ignorant of the truth." *Robbins v. Magee*, 76 Ind., 381. "It is a settled rule of pleading * * * that when an estoppel is relied upon, it must be set forth with particularity and precision, and nothing can be supplied by intendment or inference, and if there is ground for inference or intendment, it will be against, and not in favor of an estoppel." *Bartholomee v. Town of Lowell*, 72 N. E., 1030. No basis for the application of the doctrine of equitable estoppel is shown by this fifth paragraph of the affidavit, and can be supplied by intendment. The fifth paragraph, therefore, fails to show a defense.

Defendant's counsel claim that *Greenhoe v. College*, 144 Pa., 131, is sufficient to show that an estoppel appears in what is set out in paragraph 5. We do not understand it. That case was not upon the sufficiency of a pleadings to show an estoppel but was on the sufficiency of the

evidence shown to sustain an estoppel, which the jury had found by their verdict to exist. Apparently the pleadings were entirely sufficient. The appellants, who were the plaintiffs, had leased to Jacob Greenhoe, the father of one plaintiff, and the husband of the other, a saw mill which plaintiffs had obtained from the Geiser Manufacturing Company, and had caused the manufacturers to deliver the mill to Jacob Greenhoe, in a distant county, wherein he alone conducted a business of his own for several years, and contracted debts on the faith of his ownership of the mill. Two of his creditors attached the property, whereupon the Geiser Manufacturing Company gave notice that they, and not Jacob Greenhoe, were the owners thereof. A sheriff's interpleader was framed to try the title, and it was pending for a couple of years, when the Manufacturing Company withdrew their claim, whereupon the Court made an order that plaintiffs, who had then obtained judgments, to proceed to sell the property, which the sheriff did, in April, 1885. The plaintiffs were cognizant of these facts, and they were represented, while the interpleader proceeding was pending, by the same attorney who represented the Geiser Manufacturing Company. Notwithstanding this knowledge on their part, they kept silence, and laid no claim to ownership, until about two years after the sheriff's sale, when a written demand was served on the purchasers at the sale, wherein was this recital: "You are hereby notified, as you were notified at the sale, that the property was the property of claimants." The recital as to a notice at sheriff's sale was unsupported by evidence on the part of the plaintiffs, but it was disproved by defendant's testimony, and they also showed the foregoing facts about the acquiescence of plaintiffs without claim of sale, in the proceedings in which the interpleader had been framed. The plaintiffs did not give in their paper book in their appeal to the Supreme Court, all the evidence pertinent to the disputed question of estoppel and the Supreme Court said that, in itself, would be sufficient to warrant the affirmance of the judgment. But looking into the testimony that was actually brought up, the Court also held that the evidence sufficiently supported the claim of estoppel. The ratio decidendi, on this point, appears on page 138, from this extract from the opinion:

"The appellants allowed the insolvent husband and father to receive the property directly from the manufacturer, and to go with it, as the apparent owner, into a distant county 'to make a living.' They knew the business in which he was to engage could not be prosecuted without money or credit; that he had no money; and that he must obtain credit, if at all, in the belief that he was the owner of the property in his possession. The credit was obtained, the debts were not paid, and the confiding creditors seized the property with the knowledge of the appellants, who made no claim to it but allowed it to be sold to innocent purchasers in satisfaction of honest debts contracted on the faith of it. It would seem from the conduct of the appellants that when the Geiser Manufacturing Company, withdrew its claim, they had no intention of ascertaining title to the property, but if they entertained a purpose to do so, it was bad faith to the officer, attaching creditors, and purchasers to conceal it. Under the circumstances, it was their duty to announce their claim or abandon it. We think they are estoppel by their conduct from claiming the property in dispute, and we dismiss the specification of error."

Every element to an estoppel in pais appears in that statement of facts, but they bear no resemblance whatever to the facts recited in this fifth paragraph, which do not disclose any reliance upon or action taken on the faith of plaintiffs having assented to the sale of their own property as being the property of another. The case cited shows an acquiescence for years in what had been done, and is an example of estoppel by acquiescence. *Pepper & Lewis Dig. of Decisions* so classifies it. "Estoppel is a protection, and not an offensive weapon, and its operation should be limited to saving harmless or making whole the person in whose favor it arises, and should not be made an instrument of gain or profit." 16 Cyc., 725.

The affidavit in this case does not disclose in affiant's favor, that he stands in a situation with reference to plaintiffs' conduct as to bring himself within the equity that must vitalize every case of genuine equitable estoppel. Therefore, it is not shown that plaintiffs have estopped themselves from claiming the benefit of the title they never transferred—or essential to the transfer of.

6th. The good faith of affiant in purchasing the

goods at the sheriff's sale, and paying for them, believing that they were the goods of De Luca, will, of themselves, give affiant only such title as De Luca had, and personally had a legal right to transfer by his own voluntary act to a purchaser; and since De Luca had no such title, the affiant could get none, even at a compulsory sale of the property as being De Luca's. The sale by a sheriff would add nothing to the title attempted to be taken. Unless the true owners are estopped from showing their ownership—and that has not been made to appear—there is no defense shown by anything contained in the affidavit of defense.

Therefore, the rule for judgment for want of a sufficient affidavit of defense is made absolute.

SCHWALM v. CENTRAL DISTRICT AND PRINTING TELEGRAPH COMPANY.

Real Estate—Notice by Possession—Pole Lines. Practice—Motion, after Issue and Trial, that Action Should Have Been Assumpsit Rather than Trespass

Where the plaintiff purchased the land upon which the defendant had a telephone line then in use, it was his duty to inquire of the defendant in the absence of record title as to the rights and privileges defendant had in the land, and where in such a case the defendant telephone company had the right to erect additional poles under a written agreement with the plaintiff's predecessor in title at the time the pole line was originally constructed across the land, it was held that the defendant had the right to erect the additional poles under the terms of the original agreement. The plaintiffs being put upon inquiry by the actual conditions on the land.

Where by the terms of such a written contract, the defendant was granted the right to construct, operate and maintain its lines, including the necessary poles, fixtures and wires over the land by the predecessor in title, to the plaintiff, of necessity this would include the right to make the necessary entries on the plaintiff's land at a proper season and in a proper way and, in the absence of negligence or disregard of the rights of the land owner, he would not be entitled to recover for the incidental injuries.

Upon a motion of judgment non obstante veredicto, it is claimed by the defendant that assumpsit was the appropriate remedy rather than trespass, in which form the action was commenced, it was held that it was too late after issue and trial, for the defendant to raise the objection that the action should have been assumpsit rather than trespass.

In the Court of Common Pleas of Westmoreland County, No. 534 May Term, 1916. Trespass. Motion for judgment non obstante veredicto and for new trial.

Walkinshaw and Walkinshaw for Plaintiff.
Williams, Wegley and Doran for Defendant.

Copeland, P. J.: This is an action of trespass brought to recover damages for injuries alleged to have been done to the land of John Schwalm, plaintiff, by hauling poles back and forth over it and additional servitude placed on the land by the erection and supporting of the telephone line of the defendant company by the thirteen additional poles. The facts of this case are as follows:

On and prior to the 22nd day of November, 1898, Lettie W. Pantall, widow, was the owner in fee of a tract of land, containing 70 acres, more or less, situate in Derry Township, Westmoreland County, Pennsylvania. On that date she gave to the Central District and Printing Telegraph Company of Pennsylvania her written consent to construct a telephone line across this land, which is in the following language: "\$10.00. Received of the Central District and Printing Telegraph Company, of Pennsylvania, Ten Dollars in consideration of which I hereby grant unto said company, its successors and assigns, the right to construct, operate and maintain its lines, including the necessary poles, fixtures and wires, over and along the property which I own or in which I have any interest, in the Township of Derry, County of Westmoreland, and State of Pennsylvania, and also along the roads, streets or highways, adjoining the property owned by me said sum received in full payment for such right, and in full satisfaction for the trimming of any trees along said lines necessary guy and brace poles, and attach to the necessary guy wires. The above sum of ten dollars is paid in full for all privileges of C. D. & P. Tel. Co. setting poles, fixtures and wires over and along my private land if there are more than ten poles on my private land the C. D. & P. Tel. Co. shall pay \$1.00 for each additional pole.

"Witness my hand and seal this the 22nd day of November, 1899, at Blairsville, Pa. L. W. Pantall, (Seal); M. J. Pantall, (Seal). Witness B. W. Havnar," (Exhibit "A").

Pursuant to this grant, the telephone company, sometime between the 22nd day of November, 1899, and the 30th day of November, 1900, erected its line on this property as a part of the system of the Greensburg and

Blairsville line. On the 30th day of November, 1900, L. W. Pantall receipted for \$8.00 for erecting and maintaining eight additional poles and anchors on her property. On the 8th day of January, 1909, Lettie W. Pantall conveyed to John Schwalm, the plaintiff, the seventy acre tract over which this line of the telephone company was erected.

The telephone company, in the winter of 1914, by reason of a storm, repaired its line through this property, and for the entry upon the land at that time the defendant company compensated the plaintiff, which is evidenced by a receipt, marked Plff's Ex. 1, which is as follows: \$3.00. Received of The Central District Telephone Company Three and No/100 Dollars, in consideration of which I hereby release said company, its successors and assigns, from all claims or demands against said Company for damage to field of rye caused while repairing above named company's telephone lines on my land bounded on the North by land now or late of John Hot-ham, on the East by land now or late of W. M. Piper and on the South by land now or late of Penna. R. R. Co. and situate in the Township of Derry, Westmoreland County, Penna. Witness my hand and seal this Fifteenth day of February, 1915, at Millwood, Pa. John Schwalm, (Seal). Witness: W. D. Johnston."

On or about the 1st day of February, 1916, the defendant company hauled on the plaintiff's property and erected thirteen additional poles to give the line additional support. For the erection of these thirteen additional poles the plaintiff claimed damage to his crops and to his land both by reason of cutting it up in hauling the poles back and forth and placing additional servitude thereon, and for this alleged damage the plaintiff brought suit, and at the trial on the 8th day of December, 1916, he recovered a verdict in the following form: "And Now, to wit: December 8, 1916, we the jurors empanelled in the above entitled case, find a verdict in favor of Plaintiff, to wit: Temporary damages to crop and land, \$166.66; permanent damages to the land by reason of erecting poles, \$95.00."

The defendant, on the same day the verdict was rendered, filed two motions, one for judgment non obstante veredicto and the other for a new trial. It is these two

motions that we now have to deal with, and dispose of. This has been to us a very difficult case and has given us no little trouble. It was said in the case of *Rowe v. Ream*, 105 Pa. 543: "The possession of land is notice to the world of every title under which the occupant claims it, unless he has put a title on record inconsistent with his possession. When, as in this case, an individual is in possession under no recorded title, his possession is notice of every title which he can set up to protect himself, sufficient at least, to put a purchaser on inquiry * * * Why then, should a purchaser be suffered to act on probabilities, as facts, at the risk of any one but himself when a moment's share of attention would prevent misconception or loss." To the same effect is *White v. Patterson*, 139 Pa. 429.

It is clear, therefore, that when John Schwalm purchased the land here involved (the telephone line of the defendant being then in use over said land) it was his duty to inquire of the defendant, in the absence of a record title, as to the rights and privileges it had in the land. This inquiry would have informed the plaintiff of the rights of the defendant under the written agreement with L. W. Pantall, the former owner, marked Ex. "A" in this case. We have concluded that under Ex. "A" the defendant was granted the right to erect additional poles over said land as its needs might require, for which it was to pay \$1.00 for each additional pole, and that the right was not lost by the conveyance of the said land to the plaintiff. This was a subject about which the immediate parties to that contract were at liberty to deal and about which they did deal, as evidenced by said writing. It was in the contemplation of the parties that the future needs of the defendant might require that the line be strengthened to bear the increased weight of the additional wires, and we find provisions in the agreement to care for such condition: "If there are more than ten poles on my private land the C. D. & P. Tel. Co. shall pay \$1.00 for each additional pole," and we conclude, therefore, that we were in error in permitting the jury to find the damages sustained by the plaintiff by reason of the erection of 13 additional poles on his land. The only amount in that regard which he was entitled to recover in this action is the sum of \$13.00.

It is claimed by the defendant, in its motion for judgment non obstante veredicto, that assumpsit is the appropriate remedy and since this action is trespass there can be no recovery here for the additional poles erected on the plaintiff's land. It is true that assumpsit is the remedy for the recovery of money due on contract, but we hear for the first time the objection that the plaintiff has mistaken his form of action in the motion for judgment non obstante veredicto. Clearly it is too late now, after issue, for the defendant to raise the objection that the action should be assumpsit and not trespass. *Welker v. Metcalf*, 209 Pa. 373. *Weidner v. Roeper*, 25 District Reports, 876. The verdict in favor of the plaintiff, representing permanent damage to the land by reason of erecting poles, \$95.00 must be reduced to the sum of \$13.00.

That part of the verdict representing temporary damages to the crops and land has given us considerable trouble. Further examination of the contract (Ex. "A") and our charge to the jury at the trial convinces us that the charge was erroneous in part. By the terms of the written contract, the defendant was granted "the right to construct, operate and maintain its lines, including the necessary poles, fixtures and wires," over the land of the predecessor in title to the plaintiff. Of necessity, this would include the right to make necessary entries on the plaintiff's land at a proper season and in a proper way, and in the absence of negligence, recklessness or disregard of the rights of the landowner, he would not be entitled to recover for the incidental injuries. With respect to natural gas companies' possession, with the right to enter upon private land for the purpose of constructing their lines (no more comprehensive rights than are granted by the contract in this case), it was said by the Supreme Court, in *Clements v. Philadelphia Company*, 184 Pa. 28, in construing their rights under appropriation:—"The right of entry was incident to the laying, and care of the line while the easement was being enjoyed, and when its enjoyment was no longer possible it was an incident to the right to withdraw from the land and surrender the privilege acquired under the right of eminent domain. But neither while the line was in use, nor after its use had ceased, did the right of entry author-

ize the doing of any substantial injury to the owners beyond the burying or removal of the pipe in the best way practicable.”

In entering upon the land of the plaintiff in February, 1916, for the purpose of constructing and repairing its line, did the defendant act in the best way practicable and with due regard to the owner? Was no unnecessary damage done to the turf, soil and growing crops of the plaintiff? Further examination of the testimony satisfies us that there was testimony which did warrant the finding by the jury that unnecessary damages were inflicted upon the plaintiff by the actions of the defendant and that the Court could not have withdrawn these features of the case from the consideration of the jury. We do not believe, however, that the proof, when properly considered, warrants any such verdict as returned on this feature of the case and, therefore, the finding by the jury must be reduced if substantial justice is to be done. We have concluded that the allowance for damage to the turf, soil and crops should be reduced to the sum of \$50. Two days were spent in the trial of this case; at most, it involves a very small one, and no good purpose will be served by another trial at an additional expense to the parties and the sacrifice of the time of the Court.

And now, to wit: the 21st day of April, 1917, it is ordered, adjudged and decreed that unless the plaintiff, within twenty days, file a certificate agreeing to accept a verdict in the sum of \$63.00, a new trial is granted. If such certificate is filed within the time limited, judgment may be entered in favor of the plaintiff and against the defendant in the sum of \$63.00 upon the payment of the jury fee.

BARTHOLOMEW v. ALLENTOWN NATIONAL BANK.

Married Women—Collateral—Act of June 8, 1893, P. L. 344.

A married woman can, under the Act of June 8, 1893, P. L. 344, deliver personal property to a creditor to secure him against her husband's indebtedness.

In the Court of Common Pleas of Lehigh County.

Mary E. Bartholomew v. Allentown National Bank. No. 31, October Term, 1915. Assumpsit. Rule for Judgment for Want of a Sufficient Affidavit of Defence.

Horace W. Schantz, for Plaintiff.

Dewalt & Reno, for Defendant.

Henry, P. J., Fifty-second Judicial District, specially presiding, April 28, 1917. This suit is brought for the recovery of the proceeds of certain collateral claimed to have been deposited by the plaintiff, a married woman, to secure certain indebtedness of her husband, and later sold by the defendant. The collateral embraced certain bank stock and bonds. In addition to claiming generally for the total amount of the proceeds of the sale of the said collateral, the plaintiff claims a balance of said proceeds which is an amount over and above the indebtedness which the said collateral was given to secure. The plaintiff in paragraph six of her statement sets forth the account between herself and the defendant as represented by a certain memorandum furnished to her by the defendant and from which memorandum it appears that the said balance over and above the notes which the collateral was to secure, was "credited on note \$2500 Mary E. Bartholomew Due March 21st, 1911."

The defendant has filed an affidavit of defense, under the Practice Act of 1915, raising only questions of law, averring in substance that the plaintiff's statement sets forth no right of recovery in this action for the reason that the deposit of the stock and bonds by the plaintiff was not in violation of the provisions of Section 2 of the Act of June 8, 1893, P. L. 344, even though made to secure the debt of her husband, and that for any part of said proceeds over and above the indebtedness for which said collateral was given as security the plaintiff's statement sets forth that it was admittedly applied to an indebtedness of the plaintiff herself; and asking for judgment against the plaintiff upon the questions of law thus raised.

The plaintiff has taken out a rule for judgment for want of a sufficient affidavit of defense.

The first question raised by these pleadings is whether a married woman can be relieved against her

giving her personal property to secure the indebtedness of her husband, as being in violation of the Act of June 8, 1893, P. L. 344. It must be regarded as settled that the said Act of Assembly, being an enlarging and enabling act, must not be so construed as to narrow a married woman's contractual capacity; that the restriction against becoming accommodation indorser, maker, guarantor or surety for another must be held to apply only to the technical contract of indorsement, guaranty or suretyship, and that the giving of the real or personal property of a married woman to secure the indebtedness of her husband or any other person is not within the restrictive terms of the act.

Kuhn v. Ogilvie, 178 Pa., 303.

Dusenberry v. Insurance Co., 188 Pa., 454.

Adams Paper Company v. Cassard, 206 Pa., 179.

Yeaney to use of Bank v. Shannon, 256 Pa., 135.

These decisions also are an affirmation of the law existing prior to the passage of the Act of 1893:

Little's Appeal, 36 Pa., 131.

Kulp v. Brant, 162 Pa., 222.

Under these authorities we must hold that the plaintiff is not entitled to recover for the proceeds of the sale of her stock and bonds and the application of the proceeds was properly made to the indebtedness which they were given to secure. There is in the statement some suggestion of the securities having been sold without any notice having been given to the plaintiff but there is no averment of this being in violation of the contract or agreement under which the securities were delivered to the defendant.

The plaintiff would be entitled to recover any balance of proceeds in the hands of the defendant over and above the indebtedness to secure which the said stock and bonds were given unless the defendant has some setoff or counter-claim against the plaintiff. The only conclusion to be reached from a reading of the sixth paragraph of the plaintiff's statement is that, according to a memorandum submitted by the defendant and adopted by the plaintiff as a part of her statement, the said balance of the proceeds derived from the sale of said collateral was applied and credited on a note of the plaintiff in the sum of Twenty-five Hundred Dollars (\$2500). It nowhere

appears from the statement of the plaintiff that this twenty-five hundred dollar note was an obligation of the husband of the plaintiff or that she was a surety or accommodation party thereon. The reference in the fifth clause to a written consent by the plaintiff to the holding of the bonds as collateral for a W. H. Bartholomew note does not remedy this weakness for it has no reference to any specific note and cannot be said to apply to the twenty-five hundred dollar note mentioned in the sixth clause. A plaintiff's statement must be self sustaining and must show such facts as show a right of recovery. The statement in this case does not measure up to this standard and the rule for judgment for want of a sufficient affidavit of defense must be discharged and judgment directed to be entered against the plaintiff upon the questions of law raised by the pleadings, unless the statement should be amended so as to show right of recovery.

And now, to wit, April 28, 1917, rule for judgment for want of a sufficient affidavit of defense is discharged and judgment will be, and is, hereby directed to be entered against the plaintiff upon the questions of law raised by the pleadings, unless the plaintiff's statement shall be amended so as to show a right of recovery, within fifteen (15) days.

EISENHARD v. SCHMOYER.

Trespass—Alienation of Husband's Affections—Evidence.

In an action brought by a husband against another man for alienating the affections of plaintiff's wife, no evidence was offered showing that defendant advised or induced plaintiff's wife to leave her husband, or that any intimacy or improper relations existed between defendant and plaintiff's wife. Held, that the testimony failed to measure up to the degree of proof required to entitle plaintiff to recover.

In the Court of Common Pleas of Lehigh County.
George W. Eisenhard v. Morris W. Schmoyer. No. 95
June Term, 1916. Trespass. Motion for new trial and for judgment, n. o. v.

Thomas F. Diefenderfer, for Plaintiff.
Horace W. Schantz, for Defendant.

Groman, P. J., May 21, 1917. Plaintiff brought this suit to recover damages, alleging that defendant alienat-

ed the affections of plaintiff's wife; that his wife and three children deserted and abandoned him, the plaintiff, and refused to live with him. The jury rendered a verdict for the plaintiff. A motion for a new trial and a motion for judgment non obstante veredicto were made; the court is thus required to review the testimony.

The following facts were established: That plaintiff was fifty-nine years old; lived at Alburdis, Lehigh County, Pennsylvania; was married thirty-five years ago; has had seven children, four still living, aged fourteen to twenty-seven. Three of the children are living with the mother, one girl and two boys, respectively eighteen, fourteen and twenty-three years of age; plaintiff now lives with a married daughter. Defendant is a widower, his wife having died twelve or thirteen years ago; has no children; employed the plaintiff as a foreman in one of his stone quarries for the last five years; and since July 31, 1911, boarded with plaintiff's family at a rate of board agreed upon between plaintiff and defendant. That plaintiff was the owner of a house and lot near Alburdis; in April, 1913, he sold and conveyed the same to the defendant. Plaintiff was notified by defendant to vacate the premises January 1, 1916; plaintiff in June following removed his furniture from the house to another house he had rented. His wife and children refused to join him, and continued to live in the house vacated by the plaintiff. Five days before vacating the house, plaintiff informed his wife that he would move; she answered "You can go, I won't move."

The following testimony was introduced to establish acts and circumstances showing alienation of affections, or such circumstances from which such alienation might be inferred:

Plaintiff testified that one evening about two years before the trial, he and his wife with defendant were sitting on the front porch, evidently in the evening, plaintiff then said "I am going to bed;" he went up stairs; a window being open, he leaned out of the window and heard defendant say to plaintiff's wife "You don't give up, that is the way you can beat him." During another conversation that took place between plaintiff's wife and defendant, defendant said "Now we got him pretty near where we want him."

William Kramer testified he lived one-half mile away. He sometimes passed plaintiff's house in the summer time; visited plaintiff quite often; plaintiff's family seemed to be getting along well; assisted at the moving; saw the defendant there, but defendant did nothing.

Frank Kramer testified he knew Eisenhard for about twenty years; sometimes visited the family; family seemed to be getting along well; not there during the last two years. Last June defendant told him Eisenhard had to move now, and also declared Eisenhard's wife would not go with him.

Frank Kehm testified he knew plaintiff's family for fifteen years; visited family during last two years; saw defendant there at times; so far as he knew, everything was alright. Heard Schmoyer say at hotel in June, 1916, that Eisenhard had to move, that it was all over now. In reply to a question by Mr. Kehm relative to plaintiff's wife moving, defendant said "No, she can stay here." This was about a week before plaintiff moved in June.

John Arner called on Eisenhard's family several times three years ago; saw nothing wrong.

E. J. Feinour visited plaintiff's family about five years ago; family seemed to be getting along well.

William H. Hensinger testified that he lived at Alburdis; knew plaintiff's family for thirty years; was in the family several times in 1912 and 1913, but not since. Heard defendant say to plaintiff at the American Hotel, Alburdis, during a quarrel, that he would finish this job, that plaintiff had to move; that he had fixed his house, and that it was not a house for a working man to live in.

Oscar Wetzel testified that he lived on defendant's farm, about a quarter of a mile from plaintiff's home; called on the Eisenhard family several times about one year ago; had visited family for four years; saw the defendant there; also saw defendant with the plaintiff and plaintiff's wife, and witness's wife, at Alburdis; saw defendant and plaintiff's wife drive past his home three or four times in two years, about nine or ten o'clock, and also as late as twelve o'clock; a boy fourteen years old nearly always was with them. Under cross-examination, the witness testified that he saw defendant and Mrs.

Eisenhard alone together only once, and that was when they came to the farm in a buggy to fetch a bucket full of manure, during the afternoon, around six o'clock.

At other times when he saw plaintiff's wife and defendant together, plaintiff himself was present, or some other person or persons.

Charles Kratzer, a son-in-law, testified that plaintiff and defendant had a quarrel at one time; knew plaintiff's family for ten or twelve years, and visited them frequently.

The foregoing is all the testimony introduced by plaintiff to establish the alienation of the wife's affections by the defendant.

The court is of the opinion that the rule laid down in *Stewart v. Hagerty*, 251 Pa. St., Page 602 (1916), where in an action was brought by the wife against another woman for alienating the affections of plaintiff's husband, is applicable to the questions herein involved. "In view of the admitted fact of a separation between plaintiff and her husband, clear proof was necessary that defendant was the active inducing cause of that separation. The trial judge fully recognized this requirement, for he said to the jury: "The basis of the wife's claim, however, is that the cause of the separation was the evil influence exerted over her husband by this defendant. This is the basis of her claim, and in order to establish Mrs. Stewart's claim here, you must find from the evidence that this defendant was the cause of the separation; that she was not only the cause of it, but that she was wilfully the cause of it; that she acted deliberately and purposely in exerting the influence over George W. Stewart which caused him to withdraw his care, protection, comfort and companionship from Mrs. Stewart." A very careful examination of all the evidence in the case fails to disclose anything which would measure up to the degree of proof required in this instruction or that would justify an inference that defendant wilfully induced Mr. Stewart to separate from his wife, or that she was the active cause of the alienation of his affections from her. Many and various reasons might have caused the loss by plaintiff of her husband's affections. The burden was upon her to show that the defendant was the active inducing cause of that loss. Clearly she did not show

this by any proof which she offered of conduct prior to the separation.”

It was not shown that defendant advised or induced plaintiff's wife to leave her husband; no testimony was offered to warrant such a conclusion. There is no evidence of intimacy, or of improper relations existing between defendant and plaintiff's wife; in fact, the testimony fails to measure up to the degree of proof required to entitle the plaintiff to recover. The court would have been justified in giving binding instructions.

Now May 21, 1917, judgment is entered in favor of the defendant and against the plaintiff non obstante veredicto.

ROBERTSON v. INTERNATIONAL TEXTBOOK CO.

Statement—Sufficiency—Practice Act 1915.

Under the Practice Act of 1915, a statement should disclose, for the information of the defendant, the essential facts of plaintiff's case with a copy of all accounts where that is made necessary by the character of plaintiff's claim.

Where the claim is for salary and commissions and money expended, in accordance with a contract between the parties, the defendant is entitled to a statement showing for what period a given weekly salary is claimed; on what items or moneys the commissions are based, and where and how earned; and in the matter of moneys expended it should state when and to whom the moneys were paid.

In the Court of Common Pleas of Lackawanna County. Affidavit of defense raising questions of law only.

C. H. Soper, for Plaintiff.

H. R. Van Deusen for Defendant.

May 7th, 1917. Edwards, P. J. The original statement in this case contained a complete copy of the contract between the parties, and alleged a breach and repudiation of the contract by the defendant on April 6, 1910. The suit was begun on October 6, 1916. Defendant thereupon, by affidavit, raised the question of the statute of limitations. An order was then made allowing the plaintiff to file an amended statement, which is the statement now before us with an affidavit of defense raising questions of law.

According to the terms of the contract, the plaintiff was appointed general agent for the defendant for the following territory: "All of Africa, excepting Morocco, Algeria, Tunis, Tripoli and Egypt." The nature of his duties is fully described in the contract, and his compensation, with some other minor allowances, is fixed at "one pound per month and a commission of fifty (50%) per cent. of the total amount of money received," etc. It is provided in the contract that "The said general agent shall deduct and retain the said salary, commission, and compensation from the total amount of money received during the continuance of this agreement by him and his sub-agents on all contracts made as aforesaid with the parties in said territory, and the remainder of the amount so received he shall transmit or pay each mail to the said principal or its duly authorized representative, and shall each mail transmit or deliver to said principal, or its duly authorized representative, all contracts received by him and his sub-agents for said principal, together with detailed statement of all moneys received by him and his sub-agents, and a detailed statement of all reference libraries and outfits delivered or forwarded to parties making contracts as aforesaid in said territory; also a detailed statement of all reference libraries returned by or recovered from parties in said territory."

There is no allegation in the amended statement touching the breach or repudiation of the contract by the defendant. So far as the parties are concerned, and looking only at the amended statement and its averments, the contract is still in force, and the plaintiff is still the general agent of the defendant for the territory named. This is apparent from the third paragraph of the statement which reads thus:

"That notwithstanding the defendant's covenants to pay to me the sum of one pound per month and fifty per cent. of all moneys received during the continuance of said agreement, yet the said defendant has utterly failed to pay and still refuses to pay me as provided in said contract, for the whole period of time since the first day of November, 1907, to the bringing of this suit."

We are impressed with the fact that the basis of recovery as alleged in the amended statement differs from that set forth in the original statement. In the latter,

the plaintiff averred a repudiation of the contract, the breach occurring in April, 1910; according to the former, the contract is still in force, and the plaintiff seeks to recover the moneys due to him from the date of the contract to the date of the institution of the suit, thus avoiding, on the face of the statement, any question as to the statute of limitations. However, we have no present concern with this phase of the case. As a matter of pleading, we have nothing before us except the amended statement and the objection thereto.

The weakness of the amended statement is in the fourth paragraph, which is as follows:

"That there is due me from said defendant by way of salary and commissions as provided in said contract the sum of four hundred and fifty thousand dollars and money expended in behalf of said defendant relying upon the agreehent aforesaid the further sum of fifty thousand dollars, in all to wit the sum of five hundred thousand dollars.."

Defendant is entitled to a full statement of the items, with dates and amounts, which go to make up this sum of half a million dollars. For what period of time is the salary of one pound a week claimed? On what items, or on what moneys, are the commissions based? When and how were the commissions earned? How were the fifty thousand dollars expended? When, and to whom, were the moneys paid?

The statement should contain all the material allegations constituting the basis of plaintiff's claim. As there is no provision for a bill of particulars in the Practice Act of 1915, it follows that the statement should disclose, for the information of the defendant, the essential facts of plaintiff's case, with a copy of all accounts where that is made necessary by the character of plaintiff's claim.

As the law is liberal in the matter of amendments to pleadings, we allow plaintiff thirty days from this date in which to file a second amended statement; otherwise judgment for defendant.

SOFRANCKY v. MARKOWITZ.

Practice—Checks—Evidence.

After issue joined and trial on merits of plaintiff's case, the sufficiency of the affidavit of defence cannot be attacked.

A check of itself is not evidence of a debt or loan.

The endorsement of a check by the payee, and receiving the money called for by it, raises no presumption of a promise to pay the amount to the drawer of the check.

In the Court of Common Pleas of Lehigh County. Wolf Sofrancky v. Morris Markowitz. No. 45 January Term, 1917. Assumpsit. Non-suit. Rule to Strike Off Non-suit.

Dallas Dillinger, Jr., for Plaintiff.

Fred B. Gerner, for Defendant.

Henry, P. J., Fifty-second Judicial District, specially presiding, July 31, 1917. At the conclusion of the presentation of the plaintiff's case, the court granted a compulsory non-suit for the reason that no right of recovery had been proven by the plaintiff and he has now taken a rule to show cause why the non-suit should not be stricken off.

The burden of the argument in support of the rule is, first, that the affidavit of defense filed in this case is not in accordance with the Practice Act of 1915; second, that the non-suit was granted for no reason set up in the affidavit of defence, and therefore it should not stand.

When we go to trial we are past the point of questioning the sufficiency of the affidavit of defense; the joining of issue concedes that the defendant has set forth a defense that entitles him to a trial by jury; and the affidavit of defense drops out of the case, except in so far as it admits or does not deny the allegations of the statement. It is to be noted that the affidavit of defense denies the material allegations of the plaintiff's statement, or puts the plaintiff to the proof of them.

The second contention is equally without merit. When the non-suit was granted we had not reached the point of considering the defense, or whether the defendant had a defence which he had advanced in his affidavit. The plaintiff had presented his case, and the defendant raised the question of its sufficiency to sustain a verdict, and that is all we have to consider now. The plaintiff

proved that he had given defendant six checks drawn to the order of the defendant, and endorsed by him, aggregating \$540.00, and for which the defendant received the proceeds. Nothing further was offered in evidence and the case could only then have been submitted to the jury on the assumption that the endorsement of the check by the payee, and receiving the money called for by it, raises the presumption of a promise to pay the amount to the drawer of the check. If this is so, it must be based upon the fact that checks are customarily and usually given only in making loans. This would be contrary to what everybody conversant with business affairs knows to be the common practice, and would place a burden upon every man who received a check in payment of a bill, claim or obligation. The legal presumption is that a check of itself is not evidence of a debt or loan, but that it was taken in payment of a debt or that some consideration was given for it: Gettysburg National Bank v. Kuhns, 62 Pa. St., page 88.

The non-suit was properly granted, and must stand.

Now, to wit, July 31, 1917, the rule to strike off non-suit in the above entitled case is hereby dismissed.

ROTHROCK v. LEHIGH VALLEY TRANSIT CO.

Negligence—Street Railways—Right Angle Collision—Contributory Negligence.

In an action for damages for death resulting from a right angle collision between an electric railway car and a team, where it appears that the plaintiff driving the team had exercised proper diligence and continued to look for approaching cars until within three or four feet of the track, and when, then seeing a car approaching, he used proper precautions to prevent a collision, but was nevertheless struck by the car, a verdict for the plaintiff will not be disturbed.

In the Court of Common Pleas of Lehigh County. No. 42 January Term, 1916. Clinton O. Rothrock v. Lehigh Valley Transit Company. Motions for New Trial and Judgment n. o. v. Motions overruled.

Fred B. Gernerdt, for Plaintiff.
Dewalt & Reno, for Defendant.

Groman, P. J., September 4, 1917. The plaintiff

seeks to recover damages for the death of a minor child fatally injured on the sixth day of July, 1915, while plaintiff was driving his motor car along Columbia Avenue, in the village of Rittersville, which avenue intersects the Allentown and Bethlehem highway at right angles, and while about to cross the tracks of the street railway operated by defendant company, located on said highway. After the close of plaintiff's case, binding instructions were asked for by the defendant, but refused by the court. The jury rendered a verdict for the plaintiff. The defendant entered a motion for a new trial as well as a motion for judgment non obstante veredicto. At the argument the defendant strongly urged the court to declare as a matter of law, that plaintiff was guilty of contributory negligence in that he placed himself in danger so obvious that if he had exercised due care he could have seen or heard the approaching car.

From the facts in the case it appears that to the northeast of the point of intersection of Columbia Avenue with the Allentown and Bethlehem highway hereinbefore referred to, twenty-two feet from the first rail of the track, stands a frame house. Plaintiff had his car under control, was familiar with the conditions existing at said crossing; when past the frame house he looked in an easterly direction for an approaching car, the point where plaintiff looked was twenty-two feet from the northern rail of the first track, the view was unobstructed by the house, and plaintiff could see upwards of one hundred and eighty to one hundred and ninety feet. Seeing no car, plaintiff proceeded, continually looking towards the east until he reached a point within three or four feet of the track, when he saw a car approaching, at least one hundred feet away. Plaintiff immediately applied the brake and used the clutch, but was unable to entirely stop the car until the front wheels were on the first rail of the track; his car was then immediately struck by the trolley car. Plaintiff also submitted testimony showing that the trolley car was running at the rate of thirty-five to forty-five miles an hour, that no whistle was blown until immediately before the car struck, that the car ran one hundred and thirty-five feet after it struck before it came to a stop. Could the court say as a matter of law that plaintiff was guilty of contributory negligence? In *Clift v. Phila.* and

W. C. Co., 52 Pa. Sup Ct., Page 502, where the plaintiff looked for the approach of a car twelve feet from the track, and where the facts relative to the care exercised by the plaintiff while approaching the street railway track are not as strong as in this case, the court used the following language: "The entire testimony of the plaintiff clearly indicated that the only standard of duty which he recognized in the matter was that if he could reach or cross before the car got there, it was the business of the motorman to stop the car until plaintiff got out of the way. If this were all that the plaintiff's testimony disclosed the case might still be for the jury." In Mackey, Appellant, v. P. & W. C. Traction Co., 227 Pa. St., Page 482, the facts were that a four-horse team attached to a heavy oil wagon drove within eight feet of the first rail of a double track line, the driver then crossed the track, and while so doing was struck and killed. He had a clear view in the direction of the car of five hundred and sixty feet, he saw no car approaching. The car ran two hundred feet or more beyond the place of the accident before it could be stopped. The lower court entered a non suit which it later refused to take off; upon appeal, the judgment of the lower court was reversed and procedendo awarded. The Supreme Court on page 485 used the following language: "But in addition to the positive evidence of the care which he exercised, not only in looking for an approaching car as he came to the edge of the first track, but in stopping his team and listening as well, it may be presumed in the absence of any testimony to the contrary that he also continued to look for an approaching car, until his leading horses were entering upon the line of the second track. Whether he was negligent or not, in entering upon this track when he did, would be a question of fact for the jury. If the car was then in sight, and too close to justify him in proceeding, that was a matter for the defense to show." And again on page 487 "As to the question of contributory negligence upon the part of the driver of the team, in such case as this, that can only properly be so pronounced by the judge as a matter of law, when the evidence is clear and undisputed, but in attempting to cross the tracks, he had driven in front of an approaching car, when it was so near to him that the motorman could not reasonably be expected to

stop his car in time to prevent the collision. But when there is testimony as in this case, that with a long and unobstructed view of the tracks, no car was to be seen when the driver reached the edge of the line, and that the space between the point where a possible approaching car would appear and the line of the crossing was such as would seem ample under ordinary circumstances to permit of safe passage; when, notwithstanding such an alleged situation, during an attempted crossing of the tracks, a collision occurs, it seems to us that the questions of negligence and contributory negligence should properly be left to the determination of the jury." The question of contributory negligence by plaintiff was properly left to the jury. The motion for a new trial is overruled.

Now, September 4th, 1917, the motion for judgment for the defendant non obstante veredicto is also overruled, and judgment is ordered to be entered in favor of the plaintiff.

NILES ET AL. v. RICHLEY.

Equity—Public Garage—Damage to Adjacent Properties.

Plaintiffs' bill set forth the proposed erection of a public service garage by defendant, the injuries that would result therefrom to their respective properties, and prayed for an injunction. Defendant demurred, contending that no injunction could be issued in advance of the erection of the garage; that the question of whether or not it was a nuisance must first be determined by an action at law; and asked for a jury trial. Held, that the demurrer must be dismissed and the prayer for a jury trial denied.

The allegations that the proposed garage, if it should be erected, would necessarily become a nuisance; that it would interfere with the safe and quiet use of plaintiff properties, and of the streets and sidewalks adjacent thereto; and that it would interfere with divine services in a nearby church, (one of the plaintiffs,) if fully proven, entitle the plaintiffs to equitable relief, because of the inadequacy of an action at law as a remedy for such injuries.

In the Court of Common Pleas of York County. No. 2, August Term, 1917. Sitting in Equity.

Stewart & Gerber and W. A. Miller for Demurrer.
Niles & Neff, Contra.

October 15, 1917. Wanner, P. J. The plaintiffs' bill prays for an injunction to restrain the defendant from

erecting and operating a public garage on East Market Street, York, Pa., at a point indicated in said bill, for the reason that said proposed garage would necessarily become a nuisance, and would be so prejudicial to the safe and quiet enjoyment of their respective properties, that they would have no adequate remedy at law for their respective injuries.

The defendant, in a single document, filed a demurrer and an answer to the bill, including also therein a demand for a jury trial under the provisions of the Act of June 7th, 1907, P. L. 449. He denies the jurisdiction of the Court, and contends that no injunction could issue against the proposed garage, in advance of its erection and operation, and that the question of whether or not it would be a nuisance must first be determined by an action at law before a court of equity could acquire jurisdiction.

It is contended by the plaintiffs that though a public service garage may not be a nuisance per se, that if erected at the place indicated in the bill, amongst the surroundings therein described, and operated as such garages usually are, it would necessarily result in such a continuous flagrant violation of the plaintiffs' right to the safe and quiet enjoyment of their respective premises as constitutes a nuisance and entitles them to equitable relief because they can have no adequate remedy at law for such a continuing injury.

We are of the opinion that as to its law, this case is ruled by the recent decision of the Supreme Court in *Prendergast et al. v. Wall et al.*, 257 Pa. 547, where an injunction was granted against a proposed public service garage prior to its actual erection, and without a preliminary suit at law to determine whether or not it would constitute a nuisance. That case and the numerous authorities cited therein by Court and counsel, sustains the previously recognized rule that Courts of Equity have jurisdiction not only to abate existing nuisances per se, but to prevent otherwise lawful occupations from being so conducted as to unavoidably become continuously injurious to the occupation and enjoyment of the plaintiff's premises, and prejudicial to the safe and convenient use of the streets and sidewalks abutting thereon.

That bill, like this, was against the erection of a pro-

posed public garage in a residential section of a city, in the immediate vicinity of a church, and of the plaintiffs' respective properties, alleged to be injured thereby, and seems to be conclusive of the jurisdiction of a Court of Equity in similar circumstances. Whether or not the facts of this case, when fully heard, will establish the plaintiffs' claim to the equitable relief sought for in this case, is not the question now before the Court. The defendant's allegations in the answer filed by him, indicate a materially different state of facts from these on which the plaintiffs' prayer for equitable relief is based and the Court's legal conclusions must finally depend upon the satisfactorily proven facts of the case.

But we are now concerned only with the question whether the allegations of the plaintiffs' bill bring this case within that class which calls for equitable relief because there is no adequate remedy at law for the injuries alleged to be threatening the plaintiffs and their respective properties.

The most material allegations of the plaintiff's bill are that the proposed public service garage, operated as such garages usually are, will necessarily become a nuisance at this place and in these surroundings; that the damage from fire, and from gas explosions; the offensive odors, noises and other annoyances, inseparably connected with the garage business, will materially reduce the value of plaintiffs' properties and will seriously interfere with the safe and quiet use and enjoyment of the same; and also with the safe use of the streets and sidewalks adjacent thereto.

It is also alleged that divine services in the Presbyterian Church, which congregation is one of the plaintiffs, will also be interfered with. These allegations would be sufficient, if fully proven, to entitle the plaintiffs to equitable relief, because of the inadequacy of an action at law as a remedy for such injuries. They are, therefore, sufficient to give a Court of Equity jurisdiction to hear the case.

The demurrer is overruled and the defendant's request for a trial by jury is refused.

ESTATE OF JOHN RUDY, SR.

Trusts and Trustees—Liability of, for Diminution of Trust Fund by Former Trustee—Commissions.

A testator bequeathed a part of his estate in trust, for his granddaughter directing that "the interest thereof, together with a part of the principal if required" be paid annually for her support. A trustee was appointed who received \$3136.41 but on his death six years afterward a bank of which he was the president was found to be insolvent and its books showed that he then had \$2437.65, of the trust funds.

Held, that it should not be assumed that the principal had been reduced through embezzlement and that \$2437.65 was the proper amount which the trust company succeeding as trustee should have received but if it failed to collect part of that amount by not proceeding against the solvent estate of a deceased surety of the former trustee, it should be surcharged for that part.

More today is required of trust companies acting as trustees than the one-time ordinary care, diligence and good faith under the advice of counsel formerly expected from individual trustees. Extraordinary care is now expected of them.

A trustee is entitled to as much compensation as is earned, and where the duties were unusual and more than ordinarily laborious and exacting the compensation should be in proportion.

Exceptions to adjudication. O. C. of Lancaster County, March Term, 1904, No. 7.

John E. Malone and Coyle & Keller, for Exceptions.
Charles G. Baker and Charles F. Hager, Contra.

October 18, 1917. Opinion by Smith, P. J. Exception to the decree of distribution in this estate bring it up for review.

John Rudy, Sr., bequeathed one-third of his estate less three hundred dollars to his son Benjamin Rudy in trust for the use of his grand-daughter Fianna Rudy. "The interest thereof together with a part of the principal if required" to be annually paid "towards the support and maintenance of the said Fianna Rudy," who died January 10, 1917. In 1898 Charles H. Locher became the trustee. The principal committed to his care was \$3136.41. His sureties were Michael Reilly and Robert E. Locher. He died in October, 1904. His sureties died later—Michael Reilly in 1906. Charles H. Locher not only was the trustee but also committee in lunacy for Fianna Rudy. On March 16, 1905, the Farmers Trust Company of Lancaster was appointed trustee to succeed him, and Daniel D. Nein became the committee. It is known that a few days after the death of Charles H.

Locher the City Savings Fund and Trust Company of Lancaster, of which he had been the president, closed its doors and passed into the hands of a receiver. Its books showed that Charles H. Locher held \$2437.65 as trustee of Fianna Rudy.

It was contended at the audit by the exceptants in support of their exceptions to the account that the accountant had not charged itself with all the moneys which should have come into its hands, and their proofs were that Charles H. Locher as trustee had received more than had been accounted for and that the deficit could have been collected from the estate of Michael Reilly, his bondsman. The exceptions were sustained and accountant was surcharged \$1009.86. While we find no reason to doubt the correctness of the ruling as to a surcharge, a further analysis of the facts leads to the conclusion that there has been a mistake as to the amount of it. It seems to have been wrong to have acted on the theory that there had been an unlawful or improper diminution of the trust fund.

John Rudy, Sr., who created the trust, died February 1, 1875. The fund yielded an annual income of not more than one hundred and fifty dollars. Fianna Rudy was found on September 5, 1881, to have been a lunatic for many years. The trustee was expressly authorized to use of the principal for her support. The principal appears as having been reduced \$736.41. Why should it be assumed that this amount had been embezzled? It would be contrary to our system of jurisprudence to do so, and would violate accepted principles of ethics. True this money might have disappeared through no crime of the trustee, but by reason of his negligence, in which case he should have been held responsible, but there is nothing which points to such a happening. On the other hand the evidence seems to rebut any other conclusion than that the trust had been properly conserved. Henry Carpenter, Esq., a reputable member of the Lancaster bar, as counsel for parties interested in both the income of the trust and the remainder, satisfied himself that \$2437.65 was the amount which should be in the hands of the trustee, and this his clients confirmed. On the petition of Daniel D. Nein, committee, presented to the Court by his counsel Mr. Carpenter, the Farmers Trust Company

was appointed trustee. John H. E. Rudy, Sr., and Martha Rudy, children of John Rudy the testator, and beneficiaries under the will, who had vested interests in the fund held for the use of Fianna Rudy also were his clients. Mr. Carpenter testified:

"My clients said that all the income had been paid that was due to that time, and thought the only money that was due was on deposit in the City Trust Company—that was the total fund that he had in his hands on deposit in the City Trust Company. To his credit as trustee of Fianna Rudy, and that represented what was due to the estate. . . . My clients told me that they thought the money on deposit was all that was left. . . . I think this twenty-four hundred was simply what was actually in his hands belonging to them. . . .

"Q. Did you from time to time while you were counsel for the present trustee advise certain of the residuary legatees of the condition of this trust fund?

"A. I did. My client, John H. E. Rudy and Martha Rudy. Of course, I never had much conversation with Fianna, the lunatic.

" . . . He told me he thought that was the whole fund; that he had paid the rest of it. . . .

"Q. You don't mean that any of these residuary legatees ever told you that they knew any portion of this principal was lost, that you should not go after it?

"A. No, sir. They didn't tell me that exactly. They, of course, wanted all that was due them, as far as that was concerned; but they thought what was in the City Trust Company was all he had belonging to them."

Mr. Carpenter did not represent all the interested parties, but those for whom he acted evidently believed \$2437.65 was the correct amount. If the others were informed, their testimony probably would be to the same effect. If they were uninformed, their testimony would contradict no one. It is not hazarding too much to infer that all of them, at least those whose intelligence was available, were acquainted with the situation and had satisfied themselves that that amount constituted the legitimate balance of the trust fund. The conditions lend strength to this inference: Charles H. Locher died, soon thereafter the trust company of which he had been the head failed. Naturally all persons who were in any way

associated with or depended upon him or the company busily calculated and investigated. In view of the facts and circumstances surrounding this case, we are convinced that the surcharging the accountant \$1009.86 was an error.

We now find that the amount of the corpus trust at the death of Charles H. Locher was \$2437.65, and, therefore, the amount which the accountant should have received. Including voluntary surcharges offered at the audit, it has accounted for \$2233.30, which is made up of dividends received at irregular intervals from the City Saving Fund and Trust Company, the estate of Charles H. Locher and the estate of Robert E. Locher. If the trustee had received all of the money which came into its hands at the time of its appointment, the interest it is inferred would have been more than \$924.70, the amount with which it has charged itself, and yet greater had there been turned over to it \$2437.65, the whole of the principal owing. The difference is a loss for which some one should be held responsible. If the accountant could have prevented it, it is the one. The three estates which it pursued, it exhausted. There was another, the estate of Michael Reilly. There was no time when the deficiency could not have been collected from this estate. It would seem as if it could have been had for the asking.

If the accountant is chargeable with more interest than that for which it has accounted, to whom is it owing? Undoubtedly until January 10, 1917, the date of the death of Fianna Rudy, it was due her and it would have been payable to Daniel D. Nein, her committee in lunacy. He is the one to demand it and no claim is made by him. Has he been properly satisfied?

The accountant is surcharged with the difference between \$2437.65, the amount which it should have had, and \$2233.50, the amount with which it has charged itself, or \$204.35, and \$2.00, interest on the sum from the date of the death of Fianna Rudy to the date of filing the account, together amounting to \$206.35.

Counsel for accountant would invoke the ancient principle that trustees are exempt from responsibility for losses if they have been ordinarily careful and diligent and acted in good faith under the advice of counsel. There have been many changes since Chief Justice Gib-

son wrote, "A trustee who has acted faithfully and by advice of counsel is not answerable for a mistake; the most prudent could do no more," which counsel has quoted from the opinion in *During's Appeal*, 13 Pa., 224. Trusteeing has become a distinctive business. Companies are chartered for its purpose endowed with corporate powers. More to-day is required of trust companies than the one-time ordinary care, diligence and good faith. Extraordinary care is now expected of them, and by reason of their exceptional opportunities and efficient equipments trust companies are measuring up to the requirements. Counsel are necessary to advise them as to the law, and there have been cases, and no doubt will be cases, where a mistake by reason of error in judgment has been and will be a moving cause for leniency. But if counsel should advise against a necessary procedure because of his ignorance of facts which are easily learned, and thereby a trust estate is depleted, hardly can a trust company trustee shield itself behind its counsel. The contention that the accountant acted under the advice of counsel, and, therefore, did not proceed to collect what could have been had from the estate of Michael Reilly, which was made up of a mortgage, bonds, stocks and a large farm in the County of Lancaster, does not even meet the old-time standard of ordinary care and diligence. Furthermore, the counsels' argument was manifestly founded on a misunderstanding of a cardinal fact, for counsel whose advice it is asking shall act as a solvent did not represent the accountant as its advisor.

What has been said substantially disposes of the first exception, practically dismisses it. The other two exceptions are to the accountant's compensation, for which there appears a credit of \$103.46. A trustee is entitled to as much as he, she or it earns. What the services rendered are worth should be paid, with which is included a due reward for responsibility. Experience has taught us that in a majority of cases a percentage, distinguished as a commission, is a fair measure. However, this is not warranted by any rule of law. The duties imposed upon this trustee were unusual and more than ordinarily laborious and exacting. It was necessary for it to search for the trust funds, to fish for them in three insolvent estates, and now must it make up a deficit because a

fourth estate had not been found. Uncertainty and litigation beset its induction into the trust. As we estimate, as many as five audits required its time and attention. Under the circumstances the compensation claimed does not seem excessive, and the second and third exceptions are dismissed.

As hereinafter reformed, the adjudication is confirmed absolutely. * * * *

JONES AND WHITAKER, PARTNERS, ETC., v.
KUNKLE.

Replevin—Automobile—Bailment—Conditional Sale—Words “Lessor” and “Lessee”—“Buyer” and “Seller”—“Rent”—Rule for Judgment.

Judgment was entered for defendant where it appeared in replevin that defendant purchased an automobile from one who had failed to make all the payments or comply with the conditions of an agreement, of which defendant had no knowledge, when the agreement upon which the original sale had been made in another state, was a conditional sale and not a lease.

In an instrument, providing for the sale of an automobile and the payment of installments for the unpaid balance of the purchase money, the words “lessor” or “lessee” were not used, but the parties were designated as “seller” and “buyer” and the word “rent” as used was equivalent to “liquidated” damages, and it was not clear that a bailment was intended, the court on a rule for judgment for want of a sufficient affidavit of defense in replevin determined that it was a conditional sale and not a bailment, discharged the rule and entered judgment for defendant.

Rule for Judgment for Want of a Sufficient Affidavit of Defense. No. 2064 July Term, 1917. C. P. Allegheny County.

J. E. Little, Jos. R. Conrad and Alexander E. Eckles,
for Plaintiff.

A. C. Christiansen, for Defendant.

Reid, J., Oct. 3, 1917—This is a rule for judgment for want of a sufficient affidavit of defense.

The action is in replevin.

The facts are all apparent upon the record, and are briefly as follows:

Jones-Whitaker Sales Company of the City of Indianapolis, Indiana, and Victor George Smith, of

Kokomo, same State, entered into the agreement a copy of which is appended to the statement of claim, wherein the plaintiff is styled the "Seller" and said Smith the "Buyer," by virtue of which, for the consideration therein specified, said "Buyer" became the possessor of a certain Chevrolet automobile. The price of the automobile was \$585.20, of which the "buyer" paid \$250.00 in hand and agreed to pay the balance in monthly payments of \$27.95 until the whole purchase price should be fully paid, with interest at 6% on the deferred payments. Provision was made that title should remain in the "Seller" until the purchase price should be fully paid.

The "Buyer" agreed *inter alia*, "not to part with the possession of said property or to remove it from the State without the written consent of the "Seller." Said buyer, however, disregarded his agreement to make such additional payments and not to remove the property from the State of Indiana, but brought it into the State of Pennsylvania and sold it for a valuable consideration to the defendant, Albert Kunkle, who had no knowledge of any defect of title, and is admitted to be an innocent purchaser.

Plaintiff replevied the automobile in the hands of said Kunkle, who gave a counter bond, and thereafter, in reply to the plaintiff's statement of claim filed an affidavit of defense averring his purchase from said "Buyer" for value, without knowledge of any limitation in the title of said Smith, and averring that the agreement referred to between said "Seller" and "Buyer" constituted a conditional sale, and not a bailment—vesting title in his, said defendant's vendor as against the "Seller."

The motion for judgment raises the sole question as to whether such instrument Exhibit "A" of plaintiff's statement, was, under the law of Pennsylvania, a conditional sale or a bailment.

Exhibit "A," the contract appended to the statement of claim, in our judgment, has all the marks of the instruments which the courts of the State have held to evidence conditional sales and not bailments.

We are aware that it is not what the parties call the agreement that controls its legal effect—and that the intention of the parties, as drawn from the instrument, must prevail as against mere designations of the thing.

But, nevertheless, the presence or absence of the terms which usually indicate an intention to make the depository of the chattels a bailee, has great weight in determining the meaning of the parties:

Kelly Road Roller Co. v. Spyker, 215 Pa., St. 332.

In our opinion, the contract in question in the case at bar is open to the criticism of that in the case cited above:

"There is nothing about this agreement that suggests a bailment except the use of the word 'lease' in the first line and the word 'rental' in the supplement. But these words were evidently used to give another name to what was meant to be a conditional sale. The agreement has none of the indications of a lease. There is no term mentioned, and there is no provision for the return of the roller except in case of default in making monthly payments. Although fixing a term and providing for a return at the end thereof, may not be essential to a bailment, they are important and often controlling evidence of the intention of the parties."

The instrument which plaintiff maintains is a bailment has less of the evidence of such intention on the part of the contracting parties, than any other which has come under our observation.

In the top line, in bold capitals, it is entitled "Contract for Purchase of Automobile." The term "lessor" or "lessee," "bailor" or "bailee," is nowhere used—nor are the terms "let," "leased," "bailed" or other phrases of a similar nature usual in contracts or bailment anywhere found. On the contrary, the parties are throughout designated as "seller" and "buyer."

The term "rent" is used but once, appearing in the fifth paragraph in connection with the right of the seller who may at his option, "either declare the entire balance of the purchase price due and collectible, or may rescind this contract to sell and take possession of the property * * * without notice; and in the event of such rescission all payments already made by the buyer, shall be taken and retained by the seller, not as penalty, but as rent for said property and liquidated damages for the breach of this contract. * * * " It will be seen from the above that the word "rent" is only an equivalent term for

"liquidated damages" and does not, standing thus alone, stamp this instrument as a lease or bailment.

The cases of *Morgan-Gardner Electric Co. v. Brown*, 193 Pa., 351, and *Farquhar v. McAlevy*, 142 Pa., 233, are also in point as to the inadequacy of the word "lease," to constitute a bailment under the facts thus presented, and as to the necessity of a provision for the return of the property to the alleged lessor, in order to affect a legal lease or bailment.

No such return, at the end of any term or period, is stipulated for in the case before us, except that incident to the failure of the "Buyer" to make payment.

Of such a provision, *McIlvaine, P. J.*, in the opinion of the trial court, *Morgan-Gardner Electric Co. v. Brown*, 193 Pa. at pp. 357-8 (affirmed by the appellate court on that opinion), says:

"This provision was not put in the contract to insure the return of the property to the Electric Company, 'so that it might have its own again,' but to insure the payment of the notes, so that the property might remain in the possession of the Coal Company as its own. It was a contract remedy to enforce payment, not of hire, but of purchase money."

The case of *Enlow v. Klein*, 79 Pa., 488, relied upon as supporting plaintiff's contention that Exhibit "A," constitutes a bailment, does not, under the facts of this case, support the proposition.

To use the term "to furnish within ten days" does not bring the case within the decision of *Enlow v. Klein*. *Woodward, J.*, in that case explicitly says:

"The use of such a word as furnish, vague as it is in its signification, would leave the clause in which it occurs of ambiguous import, if there were nothing besides to indicate the sense in which it was employed. It might imply a sale, a lease, a loan, a gift or a delivery of a chattel in payment of a debt, in accordance with its context and its subject matter."

Of the case of *Enlow v. Klein*, *Paxon, J.*, in *Stadfeld v. Huntsman & Company*, 92 Pa. St. at p. 57, says:

"An examination of the facts shows, that it was a case of hiring; that \$2 per week of the sum to be paid, was for the use or hire of the horses. This clearly appears in the report of the facts * * *. This was an important

feature of the case in our consultation, and is referred to now that it may not be misunderstood hereafter. Enlow v. Klein was fortified by the authorities, and we do not propose to disturb it. But we will not take one step beyond it. We stop just where it ends."

The instrument before us, Exhibit "A," does not, taking it in all its details, present, or suggest the idea, that the monthly payments of \$27.95 are fixed as compensation for the use or hire of the automobile in question.

In *Farquhar v. McAlevy*, 142 Pa. at p. 240, the Per Curiam opinion of the appellate court again says:

"*Enlow v. Klein* * * * stands on its own peculiar facts, and, to that extent, is authority; but, as remarked in *Stadfeld v. Huntsman* * * * we will not go one step beyond it."

It is urged by plaintiff that the contract in question presents the case of an agreement to sell in futuro, which never became executed through the failure of the "Buyer" to comply with its terms, the language of Exhibit "A" being, in part, as follows:

"The Seller, in consideration of the payments and conditions herein set forth to be performed by the Buyer, does hereby agree to furnish within ten days after the date of this agreement to the Buyer, and agrees to sell to the Buyer, subject to the conditions hereinafter contained, the following described personal property * * *."

This was followed by the actual delivery to the Buyer, of the automobile in question and the payment of \$250 required as hand money.

That such possession as was yielded to the Buyer, notwithstanding the phraseology as to a future fulfilment of conditions, is one of the chief marks of ownership, under contracts for conditional sales is apparent in *Ott v. Sweatman*, 166 Pa., 217. In that case, in the opinion of *Jenkins, J.*, at p. 222 (affirmed by the appellate court), it is said: " * * * and in doubtful cases the court in construing the contract has been governed by the principle that 'possession of personal property is the great mark of ownership.' "

In the case of *Harper v. Hogue*, 10 Supr. Ct., 624, the question presented here, that the contract was to be executed in futuro, and therefore no present title passed, was raised. The contract there was that "The party of

the first part agrees that he will sell and transfer to the party of the second part on the fulfilment of the covenants and conditions hereinafter contained"—a portable saw mill and fixtures.

Beeber, J., in the opinion of the Court at pp. 633-4, says:

"It is argued that because the agreement provides that Harper 'will sell and transfer to the party of the second part on the fulfilment of the covenants and conditions hereinafter contained,' it shows an intent that there is to be a sale only after the full payment of the purchase money. * * * Some strength might be conceded to this argument if it appeared that possession of the mill was taken in pursuance of some terms of the agreement showing a lease or bailment. * * * The agreement provides for nothing but a sale,—reserving title and calling payments rental, it is true, but still speaking only of a sale. The use of the word 'will' applies as well to the word 'transfer,' as it does to the word 'sell,' and the seller himself has put a construction on this by delivering the mill at the time of the execution of the articles of agreement. By the use of this word under such circumstances he does not seem to have meant so much to emphasize the time when he would sell in the future, but rather to express a present intent, which was to sell."

The rule for judgment for want of a sufficient affidavit of defense must be discharged. We also enter judgment for the defendant for the property in controversy.

COMMONWEALTH v. WALBURN.

Divorce—Support of Children.

The duty of supporting, maintaining, and educating children rests upon the father and during the lifetime of the father the mother is not bound to support the children.

The husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents that the children live with the mother or where the wife leaves him on good cause. But, it is otherwise where the wife leaves without cause taking the children with her.

When the father and mother are divorced and the mother marries taking with her her children by her divorced husband, the stepfather is entitled to the services of such children and obliges himself to support, maintain, and educate such children.

When a child is deserted by both parents the primary responsibility for its support rests on the father.

In the Court of Quarter Sessions of Schuylkill County. Desertion. No. 1002 September Sessions, 1917.

M. H. Spicker, for Commonwealth.
Roscoe R. Koch, for Defendant.

Koch, J. The prosecution in this case is based upon the information of Mary Miller, the grandmother of Margaret Walburn, aged four years, a minor child of the defendant. The child's mother is a daughter of said Mary Miller. Mr. and Mrs. Walburn were married in December, 1911, and Margaret was born in May, 1913. The Walburns did not get along very well together, owing to the husband's suspicions of his wife's infidelity and he left her in September, 1912. She prosecuted him for non-support in 1914, and, at the May Sessions of that year, we directed him to pay to his wife the sum of Eight Dollars per month, intended to be for the support of the child. In June, 1914, the defendant began proceedings in divorce on the ground of his wife's adultery and obtained a decree of divorce in October, 1914. The divorced wife married again about five weeks ago and her child, Margaret, has been living with its grand-mother, the prosecutrix, ever since. The defendant does not want to support the child, because he claims he is not its father and also because its mother has married again and has had control and custody of the child from the date of its birth.

A child having been begotten and born in lawful wedlock is presumed to be legitimate and no sufficient evidence to overcome that presumption was made to appear in this case. The statutory law of this state makes it obligatory upon parents to support their minor children and it also provides the means of compelling a husband and father to support his wife and minor children. Primarily, the duty of supporting, maintaining and educating children rests upon the father; and, during the lifetime of the father, the mother is not bound to support the children. 29 Cyc., 1606; Henkel's Estate, 13 Superior Court, 337-343.

A husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents to the children living with the

mother, or where the wife leaves him for good cause. But it is otherwise where the wife leaves without cause taking the children with her. 29 Cyc., 1607.

In this case, the child is rather unfortunate for it virtually now stands deserted by both of its parents, and we cannot compel its stepfather to support it. Had the stepfather admitted Margaret to his home when he married her mother, he might be responsible for her maintenance and support. Chancellor Kent says in the Second Volume of its "Commentaries on American Law," page 192, that if a stepfather takes his wife's children into his own house, he is then considered as standing in loco parentis and is responsible for the maintenance and support of the child so long as it remains with him, for by that act, he holds the child out to the world as part of his own family. In *Lantz v. Frey and wife*, 14 Pa., 201, "The defendant intermarried with the female plaintiff's mother, after which the child went to reside in the family of her stepfather, until she herself married. By this arrangement, the defendant stood in loco parentis, and was responsible for the maintenance and education of the child so long as she continued to reside with him: 2 Kent. Com., 192; *Stone v. Carr*, 3 Esp. Cas., 1; *Cooper v. Martin*, 4 East 76."

The assumed relation of father by a stepfather entitles him, on the one hand, to the services of his stepchildren and entitles them, on the other, to their support and education without remuneration. *Duffy v. Duffy*, 44 Pa., 402. A stepfather cannot recover for maintaining his stepchild unless he can prove a contract with the guardian. *Ruckman's Appeal*, 61 Pa., 251. In *Douglas' Appeal*, 82 Pa., 173, Mr. Justice Sharswood said, "The opinion of the court in *Duffy v. Duffy*, 8 Wright, 402, is direct to the point—that when a stepfather takes his stepchildren to reside with him as one of his family, while the one cannot claim for services, the other is precluded from compensation for expenditures." But a stepfather is under no legal obligation to support a stepchild after the death of the mother. *Brown's Appeal*, 112 Pa., 18.

In *Fitler v. Fitler*, 33 Pa., 50, the wife of Fitler deserted him and took her child with her. The husband later obtained a divorce on the ground of desertion and the mother brought an action of *assumpsit* for money

expended in supporting and maintaining the child. The father was able and willing to receive and support the child and it was held that the wife was, under the circumstances, not entitled to recover. The court said, "While she keeps it, on such grounds, she has no claim for compensation." When the divorce was granted no order was made respecting the custody of the child.

In the case before us, the child appearing to be deserted by both its parents, I have no doubt that the primary responsibility for its support, under such circumstances, now rests on the father.

The defendant is, therefore, directed to appear in open court on Monday, October 1st, 1917, at ten o'clock A. M., to hear and receive whatever order the court may then conclude to make in the premises.

SIMONS v. PHILADELPHIA AND READING RAILWAY CO.

After two verdicts in favor of the same party on a question of fact, new trial was denied, it being held that it must be an extraordinary case in which the Court will grant a third trial.

In the Court of Common Pleas of Montgomery County. No. 35, December Term, 1914.

T. Lane Bean and Maxwell Strawbridge, Attorneys
for Plaintiff.

Evans, High, Dettra & Swartz, Attorneys for Defendant.

Opinion by Miller, J., August 2, 1917. The motion for judgment for the defendant non obstante veredicto was not pressed at the argument. The Supreme Court has already decided this case is for the jury.

This case, which, during its progress, has enjoyed exceptional publicity, is a striking example of that class in which, it is to be regretted, "whims, sympathies, prejudice and caprices at times influence and control the judgment of men, even when sworn to be guided only by the law and the evidence in the case."—See *Dinan v. Supreme Council*, appellant, 213 Pa. 489.

Its first trial resulted in a verdict for the plaintiff. Judgment for the defendant was afterwards entered

therein, notwithstanding this verdict, for the reasons given in our opinion then filed. The only witnesses ever called by the plaintiff to prove the circumstances surrounding the occurrence were three of the surviving occupants of the automobile, in which the husband of the plaintiff was riding at the time he was killed, all of whom claimed to have been injured in the same accident and had suits pending against the same defendant for the recovery of damages. The Supreme Court, however, as already stated, on appeal, (*Simons v. P. & R. R. Co.*, 254 Pa. 507), decided the case was for the jury. Its second trial resulted in a mis-trial, after the testimony had been closed, because of the serious illness of a juror sitting in the case. Its third also resulted in a verdict for the plaintiff, but of reduced amount. The defendant now again moves for a new trial and assigns several reasons in support of its motion. We shall dispose of them together.

It is urged by it, in effect, that it is impossible to understand how the jurors reached their verdict without utterly disregarding their obligation.

Be that as it may, they, under our system of trying cases, alone can pass upon the disputed facts of the case—when there are any such—and they are presumed to have performed that duty honestly and conscientiously.

It is true that, in *Kohler v. Penna. R. R. Co.*, 135 Pa., 346, the rule to be followed in such cases is stated as follows: 'The remedy for a perverse verdict, or one against the weight of the evidence, is to set it aside and grant a new trial,—a remedy which we take occasion to say should be freely and firmly exercised, especially in those classes of cases which are apt to be affected by local or narrow views and interests or by popular sympathies or prejudices'": *Douds v. Traction Co.*, appellant, (No. 1), 51 Pa. Sup. Ct. 24.

But, here, as stated, the first trial resulted in a verdict for the plaintiff. A new trial was granted because, in our opinion, that verdict was clearly against the weight of the evidence. The second was a mis-trial. At the third, the plaintiff again recovered a verdict. At this stage of the proceedings, we adopt the language of the trial judge in the *Douds* case, *supra*: "No matter how often the case might be tried, it will always be a question for the jury, and the probabilities are that another trial

would result in another verdict for the plaintiff." This language exactly expresses our view of the case at bar. The evidence in favor of the plaintiff, by the same three witnesses, was more positive, direct and circumstantial at the third than at its first trial.

It was the peculiar province of the jury to determine the credibility of the witnesses and the weight of the evidence.

It may, it is true, be difficult to understand how they reached their verdict, but the latter will not be set aside merely because the court, if trying the question of fact, would have found differently. It must be palpably and manifestly wrong to justify a new trial.

The jury having found that the plaintiff was entitled to recover, we are not convinced that, under the evidence, the amount of their verdict was excessive.

When Mr. Simons' age, earning capacity, occupation, habits, and condition of health are taken into consideration the amount of the verdict is abundantly supported by the evidence.

To summarize, and in conclusion—It was authoritatively decided after its first trial that this case was for the jury; the evidence, on its third, on behalf of the plaintiff, was much more direct and emphatic, may we say, than on its first; we are not aware that, at the third trial, the jury disregarded our instructions on any matter of law; both of the trials that reached verdicts resulted in such for the plaintiff; we are convinced that no matter how often this case is tried the same result will be obtained; and, if the plaintiff is entitled to recover at all, the amount of the present verdict is not excessive under the evidence. After two verdicts in favor of the same party, on a question of fact, it must be an extraordinary case in which the court will grant a third trial: 2 Troubat & Haly's practice, 977, and cases cited.

This is not, in our opinion, such an extraordinary case.

Both motions are, therefore, overruled and judgment in favor of the plaintiff is now directed to be entered on the verdict upon payment of the verdict fee.

KELLY v. EICHLER, ET AL.

Tax Liens—Distribution of Sheriff's Sales—Act of 4 June, P. L. 364, Act of 21 May, 1913. P. L. 285, and Act of 10 May, 1918, P. L. 162.

Where a tax lien was filed on the 15th of September, 1915, in accordance with the provisions of Act of 4 June, 1901, P. L. 364, the procedure therein provided having been repealed by the Act of 21 May, 1913, P. L. 285, and it was claimed the tax collector had no right to claim the taxes on a distribution of the proceeds of Sheriff's Sale, it was held: That the Act of 10 May, 1917, P. L. 162, by dealing with procedure only restored the Act of 1901 to this particular case.

In the Court of Common Pleas of Westmoreland County. No. 43 February Term, 1917. Exceptions to Sheriff's Schedule of Distribution of the proceeds of the sale of real estate.

Williams, Wegley & Doran, for Exceptions.
Lightcap & Warden, for Tax Collector.

McConnell, J.: The Sheriff has awarded to D. C. Rumbaugh, tax collector, the sum of \$201.75. It is claimed by the execution plaintiff, in the exceptions filed to that distribution, that this was an error, and that that sum should have gone to increase the amount allotted on account to execcutant, on the judgment whereon the selling writ had issued. It is claimed that, inasmuch as this tax lien, filed in the tax lien docket at No. 101, was filed in accordance with the provisions of the Act of 4th June, 1901, P. L. 364, and the procedure therein provided was repealed by the Act of May 21st, 1913, P. L. 285, the legal basis for making this allotment to the tax-collector, was thereby, taken away. That the Act of 1913 had repealed the procedure provided by the Act of 1901.

The Sheriff's sale took place on the second of February, 1917. The lien was filed against the property sold by the Sheriff for the taxes for the years 1912, 1913 and 1914. This lien was filed in accordance with the provisions of the Act of 1901, which gave to collectors the right to file the lien in the prothonotary's office directly against the property upon which the taxes had been levied. The Act of 21st May, 1913, P. L. 285, provided a mode of procedure for the collection of taxes assessed on seated lands somewhat similar to that theretofore provided for the collection of taxes upon unseated lands,

thereby changing the mode for the collection of taxes from the mode provided by the Act of 1901. The taxes would thenceforth be collected through a sale made by the county treasurer.

In *Bradford County v. Beardsley*, 60 Sup., 478, the Court say, *inter alia*: "The Act of 1913 furnishes practically the same system that was in existence prior to the Act of 1901, and as was held in *Day v. Swanson*, *supra*, the Act of 1901 would be inconsistent with the provisions contained in the Act of 1913, and the latter, therefore, must effect a complete repeal of the Act of 1901, in so far as it relates to the question of procedure in enforcing collection of delinquent taxes. * * * The Act of 1913 does not take away all remedy, but provides a new procedure for enforcing the collection of these taxes."

The tax lien procedure for collection was, therefore, taken away and would be void, if attempted to be followed, as *Bradford County v. Beardsley*, shows. But the Act of 1913 did not take away the lien which was created by the Act of 1901—the right to file which existed the last day of the second calendar year after which the taxes or rates are first payable—and this period was extended by the Act of 1907, P. L. 130, to the last day of the third calendar year.

On the 10th day of May, 1917, P. L. 162 one month and six days prior to the filing of this schedule of distribution, the following Act of Assembly was passed:

"An Act to validate tax liens filed since the twenty-first day of May, one thousand nine hundred and thirteen, under the provisions of an Act, approved the fourth day of June, one thousand nine hundred and one, entitled 'An Act providing when, how, upon what property, and to what extent, liens shall be allowed for municipal improvements, and for the removal of nuisances; the procedure upon claims filed therefor; the methods for preserving such liens, and enforcing payment of such claims; the effect of judicial sales of properties liened, and the manner of distributing the proceeds of such sales.'

Section 1. Be it enacted, etc., That all liens and claims heretofore filed under and by virtue of an Act approved the fourth day of June, one thousand and nine hundred and one (Pamphlet Laws three hundred and sixty-four), entitled 'An Act providing when, how, upon

what property, and for municipal improvements, and for the removal of nuisances; the procedure upon claims filed therefor; the methods for preserving such liens and enforcing payment of such claims; the effect of judicial sales of the properties liened, and the manner of distributing the proceeds of such sales'—and its several supplements and amendments, and any tax liens filed within three months after the approval of this Act, in accordance with the provisions of said Act, be, and the same are hereby validated and made effective, as if the Act of May twenty-first, one thousand nine hundred and thirteen had not been passed.

Provided. The tax liens shall, in other respects, be legal and valid; and provided further, that this Act shall not apply to any causes already adjudicated, or any suits now pending and undetermined."

This Act was approved on the 10th day of May, 1917. It restores the procedure of the Act of 1901, to all liens theretofore filed under that Act and its supplements, and to any tax liens filed within three months after the approval of the Act of 1917.

The lien objected to was filed in accordance with the Act of 1901, on the 15th of September, 1915, that is to say, after the approval of the Act of 1913. The lien was, therefore, within the scope of the curative Act of 1917, and as to all liens so comprehended they are made valid, though they had been filed under the Act of 1901, and after the Act of 1913 had been approved.

That being true, and the exceptions being based upon the repeal effected of the Act of 1901 by the Act of 1913, the exceptions must be overruled,—inasmuch as the Act of 1913 does not affect this case. The Act of 1917, by dealing with procedure only, has restored the procedure of the Act of 1901 to this case.

The exceptions to the sheriff's schedule of distribution are, therefore, dismissed, and the schedule is approved by the Court, and the sheriff directed to pay the money out accordingly, unless an appeal be taken within the time prescribed by law.

LAKE v. LAKE.

Divorce—Residence—Proof of—Living in Another State—Place to Receive Mail.

In order to obtain a divorce in Pennsylvania there must be sufficient evidence to convince the court that the libellant had a bona fide residence in the county and state for one year prior to filing the libel. Having a designated place to receive mail or even retaining a room or paying the rent of an apartment would not be enough in itself to establish the fact of residence, when there is evidence that libellant actually lived in another state during that period.

In the Court of Common Pleas of Allegheny County.
In Divorce. No. 1511 January Term, 1916.

J. Harvey Scott, for Libellant.
Frank Ewing, for Respondent.

Shafer, P. J., October 22, 1917. When this case first came into our hands on the argument list, upon the reading of the testimony we were not satisfied as to the proof of the residence of the libellant in Pennsylvania and the case was referred back to the master to take further testimony on the question of his residence. Such testimony has now been taken and the master has filed a supplemental report in which he adheres to his former finding of residence in Pennsylvania.

It appears from the evidence that the libellant was the agent in America of a London firm known as Hazeltine Lake & Company, which since 1903 has maintained an office in the City of New York, of which the libellant has charge. The nature of the business of the firm is such that the libellant is required to travel a large part of his time, and he had an arrangement with a firm of patent lawyers in Pittsburgh having an office in the Oliver Building by which he received his mail at their place, and had, as we understand it, a similar arrangement with the same firm in Chicago. The allegation of the libellant as to his residence was that he lived with a family on the North Side, Pittsburgh, in two or three places which they had moved to and had a room there; and of the fact of his having a room there appears to be no doubt. He admitted he had a lease for an apartment in New York City, but claimed he did not live in it. After the matter was referred back a commission was issued to take testimony

in New York, and the respondent called several witnesses a grocer and a tailor, who each testified to having dealings with a Mr. and Mrs. Lake who were supposed to live in the apartment house in which the libellant had an apartment leased, and the stenographer and elevator man employed in the house in question were called, who testified that they knew Mr. and Mrs. Lake and that they occupied apartment No. 52 in that building and that the respondent, who was present at the hearing, was not the person they knew as Mrs. Lake in the apartment house. It also appeared that at the expiration of the lease in question the libellant had renewed it for another year. The libellant's statement as to the reason of his originally taking this apartment was that he expected his wife to come over and live with him and he therefore rented the apartment for nine months or a year. He further testified that he turned over the apartment to a friend of his, a Mr. O'Hynes; that his friend was not acquainted in New York and that he stood sponsor for the rent and that the apartment was occupied by O'Hynes. Mr. O'Hynes was then called, giving his testimony before the master in Pittsburgh, and testified that he lives in apartment No. 52 in the apartment house in question and that he has lived there since September, 1915, and that he pays the rent of it to the libellant. It was not stated by any one that his wife lived with him in the apartment, nor is there any account of whether he passed as Mr. Lake, and no attempt was made to bring the libellant and O'Hynes in the presence of any of the witnesses in New York who testified to a Mr. and Mrs. Lake living in the apartment. The libel was filed in November, 1915, and the libellant tells us that in the preceding summer he had taken this apartment for the purpose of living in it with his wife when she came on from London. This, it seems to us, is inconsistent with the idea that he was then a resident of Pittsburgh. The direct testimony that a Mr. and Mrs. Lake lived in the apartment in question has not been met in the way in which it might easily and naturally have been met if it were not true. Without any further discussion of the testimony in this case, it is sufficient to say that we are not only convinced that the plaintiff did not at the time of filing his libel, nor for a year before or any time since, have a bona fide residence in Pittsburgh, but

on the contrary that he was in fact living in New York during the time in question.

If this be correct it is unnecessary to discuss the merits of the case itself. It appears to us that the evidence of a wilful and malicious desertion on the part of the wife is not very strong, the conduct of the husband in sending her a cablegram to come at once, that the matter was very urgent, and then leaving the country a few days before he knew she would arrive, without any explanation of what the urgency was which he referred to in his cablegram, or of the nature of the call for his leaving the country, does not indicate a bona fide desire to have her come to live with him. Without, however, entering into the merits of the charge of desertion, the libel must be dismissed because the libellant has not sufficiently shown that he is entitled to maintain his suit in Pennsylvania.

The libel is therefore dismissed at the cost of the libellant.

KRUPP v. KRUPP.

Divorce—Desertion—Competency of Witness—Amendment of Act—Constitutional Law—Title of Act.

The Act of April 21, 1915, P. L. 154, entitled "An act to amend §1 of an act entitled 'an act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion and to the efforts made by him or her to induce the respondent to return and resume the marital relations, approved June 8, 1911, by making the libellant a competent witness generally," and amending §1 of the act of June 8, 1911, P. L. 720, so as to make the libellant a competent witness generally in all proceedings for divorce "though the respondent may not have been personally served with the libel, subpoena or rule to take depositions and may not be residing within the commonwealth, but has been served by publication only," does not violate Art. III, Sec. 6, of the Constitution, relating to the amendment of statutes, or Art. III, Sec. 3, of the Constitution, relating to the title of statutes.

In the Court of Common Pleas No. 1, Philadelphia County. Divorce. March Term, 1915, No. 477.

Thomas McConnell, Jr., for Libellant.

Shoemaker, J., April 17, 1917. The libel in this case charged cruel and barbarous treatment and indignities

to the person. The service of the subpoena was by publication. No answer was filed or appearance entered for the respondent.

The master to whom the case was referred reported that the testimony taken, including that of the libellant, sustained the libel, but as the libellant was an incompetent witness and the evidence, exclusive of hers, was not sufficient to sustain the charges in the libel, he recommended it to be dismissed. To this report exceptions were filed by the libellant.

The Act of May 23, 1887, P. L. 158, was an enabling act, as was the Act of April 15, 1869, P. L. —, which it followed and elaborated, and made all persons competent as witnesses, save those excluded by § 5 of the act, among which are husband and wife, who shall not testify against each other excepting in those proceedings for divorce in which personal service of the subpoena, a rule to take depositions has been made upon the opposite party or an appearance entered by the respondent.

This exception has been narrowed and the competency of husband and wife enlarged by acts passed since 1887, including the Act of June 8, 1911, P. L. 720, which reads as follows:

“An act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation.”

“Section 1. Be it enacted, etc., that in all proceedings for divorce on the ground of desertion, the libellant shall be fully competent to prove the fact of desertion and the efforts, if any, made by him or her to induce the respondent to return and resume the marital relation, though the respondent may not have been personally served with the subpoena or with a rule to take depositions, and may not be residing within this commonwealth, but has been served by publication only.

“Section 2. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.”

This act was amended by the Act of April 21, 1915, P. L. 154, which reads as follows:

“An act to amend §1 of an act entitled “An act enabling the libellant in all proceedings for divorce on

the ground of desertion to testify to the fact of desertion and to the efforts made by him or her to induce the respondent to return and resume the marital relation,' approved June 8, 1911, by making the libellant a competent witness generally.

"Section 1. Be it enacted, etc., that §1 of an act entitled 'An act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation,' approved June 8, 1911, which reads as follows:

"Section 1. That in all proceedings for divorce on the ground of desertion, the libellant shall be fully competent to prove the fact of desertion and the efforts, if any made by him or her to induce the respondent to return and resume the marital relation, though the respondent may not have been personally served with the subpoena or with a rule to take depositions, and may not be residing within this commonwealth, but has been served by publication only,' be so amended as to read:

" 'Section 1. That in all proceedings for divorce, the libellant shall be fully competent to prove all the facts, though the respondent may not have been personally served with a libel, subpoena or rule to take depositions, and may not be residing within the commonwealth, but has been served by publication only.' "

The master was of the opinion that as the Act of 1911 applied only to proceedings for divorce on the ground of desertion, and as the Act of 1915, both in its title and in §1, shows that its object was to amend only §1 of the Act of 1911, it did not amend the title of said act, so that the Act of 1911, as amended, is still limited by the language of its title to proceedings for divorce on the ground of desertion. In other words, that, in order to amend an act in the manner provided by the Constitution, it is necessary to amend the title to the act amended. In this we think the master was in error.

Article III, Sec. 6, of the Constitution provides that "no law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended or extended or conferred shall be reenacted and published at length."

In the Act of 1915 the above requirements have been complied with, namely, the reciting of §1 of the Act of 1911 to be amended, and the enactment of the section as amended. The title to the Act of 1915 is clear and states the purposes of the act.

If the title to an act of assembly fairly gives notice of the contemplated legislation so as to reasonably lead to inquiry as to what is contained in the bill, it is a compliance with Art. III, Sec. 3, of the Constitution. *Com. v. Moore*, 2 Pa. Super. Ct. 162; *Washington Boro. v. McGeorge*, 146 Pa. 248; *Frederick v. Canal Co.*, 109 Pa. 50; *Com. v. Jones*, 4 Pa. Super. Ct. 362.

It has not been the practice to amend the title to an act by an amending act, as a reference to the pamphlet laws will show. What was proposed to be done by the amendment is to be gathered from the title to the amending act, and if this meets the requirement of Art. III, Sec. 3, of the Constitution, "that no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title," it is sufficient. This was done in the Act of 1915. The Act of 1915 clearly expresses in its title its purpose, namely, "making the libellant a competent witness generally." The amendment of §1 of the Act of 1911 carried out this purpose. If the title of an act is necessarily a part of it, where the Constitution requires that no bill shall contain more than one subject, which shall be clearly expressed in its title, it is also a very important guide to, and aids, if need be, in its right construction. *Eby's Appeal*, 70 Pa. 311.

The effect of the amendment of the Act of 1915, therefore, is to make the title accord with the act as amended, and so much of the title of the Act of 1911 as is inconsistent with the act as amended is repealed by necessary implication. *Endlich on Int. of Statutes*, §191.

We are, therefore, of the opinion that the libellant in this case was made a competent witness under the Act of 1915, and her testimony should have been considered by the master, and the first, second, and twelfth exceptions to his report are sustained.

Having read all the testimony and considered it, we sustain the fourteenth exception, and leave is given to the libellant to enter a rule upon the respondent to show

cause why a decree in divorce a. v. m. should not be granted.

The fact that the libel was filed prior to the Act of 1915 did not render the libellant incompetent at the time her testimony was taken, which was after the approval of the act. No vested right of the respondent was impaired, the change being one of procedure only.

WALTRICK'S EXECUTOR v. HOCKENSMITH.

Pleadings—Certificate of Deposit—Survivorship.

Plaintiff's decedent deposited six hundred dollars payable to the order of himself or another (defendant), and received therefor a certificate of deposit. This certificate contained a proviso that the money belongs to the payees jointly, it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor. After the death of the testator defendant presented the certificate to the bank and drew the entire amount, with interest. Plaintiff brought suit, and the affidavit of defense alleged that the statement did not disclose a sufficient cause of action, averring survivorship and consequent title to the fund in question. Held, that a motion for judgment for plaintiff must be refused.

Affidavit of defense raising matters of law to plaintiff's statement of claim.

Motion for judgment for plaintiff. C. of P. of York County, No. 92, August Term, 1917.

Cochran, Williams & Kain, for Motion.
F. M. Bortner, Contra.

November 19, 1917. Opinion by Ross, J. The first paragraph of plaintiff's statements sets forth substantially, that Jerry Waltrick died on the 3rd day of March, 1917, testate; his will was probated on the 14th of March, 1917; the will named as the executors thereof, Elmer Duke, Harry A. Hockensmith and Guy Waltrick. Guy Waltrick renounced his right to act as executor and letters testamentary were duly granted to Elmer Duke, who is the present plaintiff, and Harry A. Hockensmith, who is the present defendant.

The second paragraph recited that "on the 13th day of July, 1916, Jerry Waltrick deposited his own money to the amount of six hundred dollars (\$600.00) in the

Western National Bank" * * * "in the City of York"
 * * * "and received from the said Western National
 Bank a certificate of deposit," as follows:

WESTERN NATIONAL BANK

Certificate of Deposit

No. 42191

York, Pa., July 13, 1916.

The amount deposited in this account belongs to the
 payees jointly, it being understood that either may with-
 draw on his or her individual order during their joint
 lives, and that any balance remaining upon the death of
 either shall belong to the survivor.

Jere Waltrick _____ has deposited in this
 Bank * * * Six Hundred Dollars, _____ Dollars,
 payable to the order of self or Harry Hockensmith on
 return of this Certificate properly endorsed \$600.00
 10.50 CHAS H. EMIG,
 for Cashier.

Thirty days' notice must be given for the withdrawal
 of this deposit.

Interest 3 per cent. per annum if left 12 months.

Not subject to check.

[Endorsed]

HARRY HOCKENSMITH.

The third paragraph sets forth in substance, that,
 "After the death of said Jere Waltrick, and before the
 probate of his will, on or about March 5, 1917, Harry A.
 Hockensmith, the defendant, presented the said certi-
 ficate of deposit at the said Western National Bank, and
 received thereon from said bank, the sum of six hundred
 dollars, and ten dollars and fifty cents interest thereon,
 said sum of money being then and there the property of
 the estate of said Jerry Waltrick, deceased, and not the
 property of the said Harry A. Hockensmith, and then and
 thereafter wrongfully and unlawfully converted the said
 sum of money to the use of him, the said Harry A. Hock-
 ensmith.

The affidavit of defense does not specifically deny
 any of the plaintiff's averments, but claims that it "does
 not disclose a sufficient cause of action," and does not
 show "any right of recovery in the plaintiff against the
 defendant, for the following reasons:

"1. The copy of the certificate of deposit of the
 Western National Bank of York, Pa., upon which the

plaintiff bases his suit, distinctly shows that Jerry Waltrick, now deceased, deposited the sum of \$600.00, upon said certificate of deposit, payable to the order of himself or Harry Hockensmith, and by special endorsement thereon provided that either may draw against it during their joint lives and that any balance remaining at the death of either should belong to the survivor.

"2. That the delivery of said certificate by said bank was a delivery to both Jerry Waltrick and Harry A. Hockensmith.

"3. Harry A. Hockensmith having survived Jerry Waltrick became the absolute owner of the fund of which the certificate was the evidence, by operation of the terms of the certificate itself, and under the law was clearly entitled to draw the funds due thereon.

"4. Plaintiff's statement is in other respects uncertain and insufficient and the allegations in the body thereof do not agree with the tenure of the instrument upon which the suit is founded, to wit: said certificate of deposit, and as a whole, does not comply with the Acts of Assembly of May 14th, 1915."

The main inquiries here are, does the money in question belong to the estate of the decedent? And did the defendant wrongfully and unlawfully appropriate it to his own use?

The plaintiff in his statement filed specifically charges that the money belongs to the estate. If this charge be sustained by the evidence, it might become necessary for the defendant to show that he did not unlawfully appropriate it to his own use.

The fact that he drew the money from the bank by surrendering the certificate before he was authorized to act as executor, is not explained by the pleadings. He must have had possession of the certificate of deposit at the time he drew the money, but his right of possession depends upon various facts which must be properly shown before an intelligent adjudication can be rendered. From the statement we must conclude that the money was originally deposited by the decedent as "his own moneys," and that he, the decedent, "then and there received from the said———bank," the certificate of deposit in question.

The statement specifically shows that, although the

certificate of deposit expressly states "that either may withdraw on his or her individual order during their joint lives," there had been no withdrawal of any part of the money deposited during the joint lives of the payees.

The language used in qualifying the general certificate of deposit implies an understanding or agreement between the parties at the time the money was deposited. We are not enlightened by the pleadings as to the meaning of the agreement.

If the plaintiff sustains his specific averment that the money in question was the money of the decedent's estate, and that the defendant wrongfully or unlawfully appropriated it to his own personal use, it would, in all probability, become necessary for the defendant to produce evidence as to the individual right to the money, and this would probably have to be evidence other than his personal testimony.

It is, therefore, evident that no judgment can now be entered upon the pleadings.

Motion for judgment is refused, and defendant is hereby required to file an additional affidavit of defense within ten days from this date.

P. A. STARCK PIANO CO. v. B. W. PHILLIPS.

Pleading—Affidavit of Defense—Counter Claim—Practice.

Where defendant in an action of assumpsit does not deny liability for the amount claimed, but sets up a counter claim for a larger amount and demands judgment for the difference, the counter claim must be defined in his affidavit of defense as fully and effectively as if he were stating his cause of action in a suit brought by him.

The counter claim being for a given sum as the equivalent of profits on sales of plaintiff's pianos in certain territory, not authorized by the defendant but alleged to be due him under an exclusive parole contract with plaintiff, is not sustained by averments in the affidavit that the number and amount of sales are facts peculiarly in plaintiff's possession, and that defendant expects to supply the necessary information on the trial.

Such averments merely state a personal conclusion, which is not only bad pleading at common law, but expressly prohibited by the Practice Act of 1915.

Motion for judgment. In the Court of Common Pleas of Lackawanna County. No. 766, October Term, 1917.

C. A. Battenberg, for Plaintiff.

Scragg, Scragg & Scragg, for Defendant.

Newcomb, J., November 12, 1917—The suit is on two promissory notes, aggregating upwards of \$700, and is between the original parties. Liability is not denied, but a counter claim for \$4,000 is set up, and judgment is demanded by defendant for the difference. His claim arises from the alleged breach by plaintiff of an agreement, not in writing, but collateral to the notes. He thus takes the affirmative of the only issue tendered and it is for him to define his claim so fully and effectively as if he were stating his cause of action in a suit brought by him. Under the present statute it makes no difference which party to an action of assumpsit happens to be the nominal plaintiff or defendant. Their respective claims and counter claims, if *ex contractu*, of whatever nature or origin, are all triable in the one action; and it necessarily follows that they are both subject to the same rules of pleading. Whether the counter claim here has been so pleaded as to warrant an affirmative judgment for the counter claim is therefore the question raised by the present motion; for it will be noted that plaintiff has not replied, but merely exercised its privilege to challenge the sufficiency of the affidavit of defense on its face to prevent judgment for the plaintiff. The case has accordingly been argued as on demurrer to the counter claim.

The notes were admittedly given to secure the purchase price of two pianos. In that connection defendant says he was given an exclusive agency by plaintiffs to sell their pianos in a certain territory, with the stipulation that if during the life of the agency any sales were made in the territory by any one not authorized by him, he should be paid by plaintiff the equivalent of such profit as he would have made had the sale been effected through his agency; that the agency was to continue during the mutual pleasure of the parties and that as yet neither one has given notice to the other of his election to terminate it; that plaintiff has by advertisement solicited sales in the territory direct from the factory at prices below the retail price of its instruments, and in fact has sold pianos at such reduced price and shipped them to persons living in the "restricted territory."

The claim arising in that way is liquidated as follows:

"The number and amount of said sales * * * are

matters peculiarly in the possession of plaintiff and for that reason impossible to be incorporated in this affidavit, but subject to subpoena and proof at a trial of the issue raised by this affidavit. * * * That plaintiff because of said facts is indebted to defendant in the sum of \$4,000, which defendant demands in this suit and claims to recover as a counter claim." See paragraphs 15 and 16 of the affidavit.

Needless to say if defendant cannot show any sales that would support his claim, the court cannot be expected to discover and supply them. The terms of the alleged agreement may be well enough stated, but no court could upon such pleading say that a breach had been committed, and give judgment even for nominal damages. If defense be taken in good faith, defendant must have knowledge of some fact or circumstance at least pointing to the conclusion so sweepingly asserted. For that alone is what he contents himself to state, viz., his mere personal conclusion, which is not only bad pleading at common law, but expressly prohibited by the Practice Act of 1915. The exigencies of the statute are not to be avoided by saying the facts are peculiarly within the knowledge of the adversary, and that the pleader expects to supply the necessary information if he can be accorded the privilege of trial by jury. If he is entitled to an accounting, there is a way to get it, namely, by suing for it. But when he seeks to avail himself of the right to litigate a counter claim by way of contest to plaintiff's suit, the proceedings to be had in that behalf as prescribed by the statute require that his claim should be so far specific that it will support a definitive, and not a merely interlocutory judgment in his favor.

The rule to show cause is made absolute and judgment is directed for plaintiff for the amount of the notes with interest, the same to be liquidated by the prothonotary, sec. leg.

IN RE JOSEPH E. SMITH ESTATE.

Error in Name of Decedent—Jurisdiction.

The register of wills has jurisdiction in all matters relating to letters which have been issued improvidently; error in the name of the decedent may be corrected by him.

In the Orphans' Court of Schuylkill County. Petition.

E. W. Shoemaker, for Petition.

Wilhelm, P. J., Nov. 12, 1917. This petition sets out that James Edward Smith died on the 22nd day of August, 1917, and it can be inferred from the caption in the petition, notwithstanding there is no averment to that effect, that letters of administration were issued in said estate in the name of Joseph E. Smith. It is presumed that the name of Joseph E. Smith was represented to the register as being the name of the decedent.

The petition further states that the widow, Minnie Smith, renounced her right to administer in favor of Thomas H. Snyder, who filed his bond for the faithful performance of his duties as administrator.

It is also alleged that there was error in the first name of the decedent and that said error "was not known or discovered until after the appraisal of the estate had been made and filed of record."

The prayer of the petition is that an order issue directed to the register to correct the record to "conform to the true facts" therein set forth.

If this court had jurisdiction to grant the prayer of the petition without notice as is proposed, several difficulties lie in the way. It is not disclosed what records are to be corrected. It is asserted that letters were issued by the register, a bond was filed by the petitioner and an inventory was made and filed. If a renunciation was filed and proof of death submitted these papers are probably on file, and neither copies of these papers, or any other papers are attached to the petition so that it could be ascertained what corrections should be made in this record.

This application should have been made to the register, who has power to revoke letters improvidently issued. Neidig Estate, 183 Pa. 492.

Letters of administration are improvidently granted

when the proofs of death were made in the name of a man who did not exist that letters were granted in that name upon the petition of a woman who was not the widow of a man of that name.

While it is possible for error of this character to be corrected in record papers upon proof after proper notice larger difficulties lie in the path of correcting the bond filed so that its value as a protection to the estate may not be impaired.

And now November 12, 1917, the petition is dismissed.

STANLEY v. BRENNEMAN.

Bill in Equity—Notice—Practice—Rule 4—Amendment.

Equity practice is governed by certain rules prescribed by the Supreme Court and such rules have the force and effect of an Act of Assembly; all proceedings in equity which do not conform to them are irregular and void.

A notice endorsed on a Bill in Equity which is not dated and does not state the place of business of the solicitor for the plaintiff violates rule four and cannot be amended.

In the Court of Common Pleas of Schuylkill County.
Demurrer. No. 5 November Term, 1917.

J. F. Whalen, for Demurrer.

A. L. Shay, Contra.

Koch, J., November 5, 1917. It will be necessary to consider only the fifth ground assigned in support of the demurrer, which is as follows: "The notice endorsed on the plaintiff's bill is not in conformity with the equity rules in that,

1. Said notice is not dated.
2. The place of business of the plaintiff's solicitor is not stated."

An inspection of the bill and notice thereon endorsed shows that the facts just stated are true.

Equity practice is governed by certain rules which our Supreme Court is by statute authorized to prescribe for our guidance, and such rules, by virtue of said statute, have all the force and effect of an act of legislature. We are bound to follow them.

"The proceedings in equity which are not in conformity with them are irregular and void." Cassidy v. Knapp, 167 Pa., 305.

"They are the rules of the courts to be enforced as of course, in all of them, and not relaxed or disregarded as a matter of mere indulgence or convenience." Railroad Company v. Railroad Company, 174 Pa., 263; Hinner-schitz v. Union Traction Company, 206 Pa., 91.

"They cannot be suspended by the Court of Common Pleas nor can that court adopt others inconsistent therewith." Green v. Paint Company, 25 Superior Court, 417.

"Even in matters of form, where a form is prescribed by them, they are binding and must be complied with." Coombe Garment Company v. Morris, 32 Superior Court, 624.

Where the subject of nonconformity with the rules is brought into question at the proper time, the bill will be dismissed. Brinton v. Hogue, 172 Pa. 366; Railroad Company v. Railroad Company, *supra.*; Cooke v. Telegraph Company 21 Superior Court, 43.

The notice endorsed on the bill of complaint does not conform to Rule 4 in the respects stated in the demurrer. Nor can plaintiff cure the defects by amendment, because the rules concerning amendments do not apply to notices.

And now November 5, 1917, the fifth cause of demurrer is sustained and the bill of complaint is dismissed at the cost of the complainant.

BAMBRICK ET UX. v. SHANAHAN.

Parties—Owners or Lessee—Elevator—Injured in—Non-Suit—Act of May 30, 1895.

Where plaintiff was injured in an elevator in a building occupied by a lessee, a compulsory non-suit was entered in an action for damages against the owner, in that the words "any person, or persons, firm or corporation, who may own any building where passenger elevators are used, shall be required," etc., in the Act of May 30, 1895, refers to owner in possession as lessee or tenant, and must be applied to a tenant in possession whether for years, for life, or even to a remainderman in fee, and not the actual "owner."

In the Court of Common Pleas of Allegheny County. Motion to Take Off Non-suit. No. 1635 October Term, 1915.

J. Harvey Scott, for Plaintiff.
Wm. Hunter, for Defendant.

Cohen, J., September 5, 1917. This was an action in trespass to recover compensation for injuries inflicted on Elizabeth Bambrick, one of the plaintiffs, through the alleged negligence of an employee of defendants, as averred in the original statement filed. The defendants named being D. F. Shanahan and Charles C. Shanahan, partners doing business as Shanahan Transfer and Storage Company. The plaintiffs had stored furniture in defendants' warehouse on Magee Street, near Forbes Street, in the City of Pittsburgh, Pennsylvania, which, the statement averred, was leased or controlled by them, said defendants. On May 25, 1914, plaintiffs called to inspect some of said furniture and remove part of the same; that an employee of defendants conducted them to the elevator. When they reached the floor on which the goods were stored, the elevator was stopped by the said employee, who was operating the same, the door was opened by him, and just as the woman plaintiff was in the act of stepping out on the floor, the elevator suddenly descended and the door or gate dropped, striking her on the right side, inflicting, as it is asserted in the statement, grievous physical injuries.

At the trial, on January 31, defendants' counsel presented an amendment, alleging that D. F. Shanahan, at the time of the accident and prior thereto owned, leased or controlled said warehouse, and praying that all the other parties named in the original praecipe be stricken out. The amendment was allowed, which was at best a doubtful procedure in view of the statute of limitations governing. However, the defendant has no cause of complaint by reason of such allowance, which was to his advantage. That feature of the case, however, was not the governing reason for the granting of a non-suit in this case, which afterwards transpired and which plaintiffs now pray may be taken off and the case reinstated.

During the trial it was developed that at the date of the accident the original defendants nor the defendant named in the amended statement constituted the Shanahan Transfer & Storage Company, but that said business

was incorporated under the laws of the Commonwealth of Pennsylvania, on February 18, 1913, charter of the same being of record in the Recorder's Office of Allegheny County, in charter book vol. 47, page 286; all of which records were offered in evidence. The testimony further disclosed that the Shanahan Transfer & Storage Company, a corporation, was the lessee in possession and control and management of the business at the time of the alleged injury. No testimony was submitted indicating that D. F. Shanahan individually engaged said employee operating the elevator at the time of the accident, or that he then controlled him in its operation. Testimony which was uncontradicted was offered, showing that D. S. Shanahan leased the building in which said business was conducted, to the D. F. Shanahan Transfer & Storage Company, incorporated, in February, 1913, for five years. Notwithstanding this, however, plaintiff claimed that D. F. Shanahan, the owner of the building, was liable in this case, his contention being based on his construction of the Act of Assembly of May 30, 1895, pertaining to the duties imposed on owners of elevators. Under the first section of the act, the duty was clearly that of the corporation to provide the devices named therein, but the suit was not against the corporation. The amendment, however, as allowed making D. F. Shanahan the sole defendant, was designed to impose upon him, as owner, liability for the injuries in this case. We can not agree in the result of this proposition, or in the construction that the words "any person, or persons, firm or corporation, who may own any building where passenger elevators are used, shall be required," etc., impose such duties on the owner of the property as such. Such construction is too narrow to carry out the wise purposes of the act in question. The word "owner" in such cases should be construed to mean the owner in possession as lessee or occupant, and must be applied to a tenant in possession whether for years, for life, or even to a remainderman in fee. The term "owner" as used in the statute evidently applies to the owner at the time of an injury without regard to the quantity or duration of his estate, and does not refer to the owner who holds the fee in the land on which the elevator is erected. It means the occupant in possession, who places the operatives in

a position of danger, and enjoys the benefits of his services: *Schott v. Harvey*, 125 Pa., 222.

To hold otherwise, as contended by plaintiffs' counsel, would nullify the very object sought to be attained by the act in question.

In taking this view as to the proper construction of the act, it becomes unnecessary to consider whether the granting of the motion can be or not allowed that neither the partner sued as the Shanahan Transfer & Storage Company, nor the defendant, D. F. Shanahan, named in the amendment, were the owners at the time of the accident within the spirit or true meaning of the word "owner" as designated therein. The business was then owned, controlled and operated by a corporation, duly organized as the Shanahan Transfer & Storage Company, who were the then lessees of the property in which the elevator was operated and had belonged previous to the accident involved herein.

We are therefore constrained to refuse this motion to take off the non-suit.

HALE v. ASHLAND.

The Sale of Fire Engines—Replevin—Ordinance.

When a borough purchases fire engines or apparatus and fails to pay the full amount therefor a writ of replevin may issue at the instance of the seller and the fire apparatus may be replevied and taken into the possession of the seller; it is no defense that the ordinance under which the purchase was made had not been advertised in accordance with law because of such alleged invalid ordinance the borough could not contract.

If a contract is void or made through fraud or imposition the goods delivered thereunder may be replevied.

In the Court of Common Pleas of Schuylkill County.
Motion for a New Trial. No. 216 January Term, 1917.

L. E. Enterline for Motion.

T. A. McCarthy and J. B. McGurl, Contra.

Bechtel, P. J., October 29, 1917. This case comes before us on a motion for a new trial. The case grows out of the sale of two fire trucks to the Borough of Ashland by the plaintiff. The contract is dated the 8th of April, 1916, and calls for the delivery of the two trucks

within a specified time, and for the payment of them in the sum of \$10,800; \$5000 cash on acceptance and the balance in three promissory notes of \$1933.33 each. The engines were delivered to the borough in pursuance of the contract and formally accepted by the borough in a written acceptance, signed by the proper officials, the seal of the borough attached. The first payment of \$5000 was made and the first of the notes for \$1933.33 was paid, but the borough defaulted on the payment of the second and the third notes as they came due.

Thereupon, the plaintiff issued his writ of replevin and took into his possession the fire trucks. On the trial of the case, two defenses were sought to be interposed by the defendants. First; that since the ordinance authorizing the execution of the contract had not been advertised in accordance with law, the contract was null and void and the plaintiff could not enforce it, and since the plaintiff was endeavoring to recover under the clause in the contract providing that the title to the fire trucks should remain in him until they were fully paid for, the action must necessarily fall, and, secondly; that the indebtedness incurred in the purchase of the fire trucks, exceed the indebtedness authorized by statute and the Constitution in relation to the defendant borough. These offers were rejected for the reason that we felt that they were immaterial, irrelevant and incompetent to the trial of the issue. The matter in controversy under this action was the title to the fire trucks. If the contract was legal, the title remained in the plaintiff and he could assert it in the manner in which he did in this case. If the contract was illegal, we do not see how the defendant borough could deprive the plaintiff of his title, as we do not believe that one may be deprived of his title through an illegal contract. To say the least, it would certainly be an injustice to permit the borough to contract and receive the fruits of the contract and hold them by setting up the illegality of the contract under which they secured possession.

As to the second offer of proof by the defendant, it is largely governed by what has been said in relation to the first. If the defendant borough could not contract for these trucks and if they are to be permitted to set up their own inability to contract and the illegality of the

contract they made, they certainly will not be permitted to claim title under these contracts and hold the identical property of the plaintiff as against him by virtue thereof.

It seems to us that it is a well settled doctrine of the law in Pennsylvania that where a contract has been made, and it develops that it is void or that the contract is the result of a fraud or imposition, that the goods may be returned to their original owner by virtue of a proceeding such as we had here. "Kay v. Haupt, 63 S. C., 16."

There is also a line of decisions which hold: The passing of title and the sale of chattels depends on the intention of the parties to be discovered from the contract and circumstances." "Commonwealth v. Guinzburg, 46 S. C., 497." "Commonwealth v. Hess, 148 Pa., 107" and cases therein cited.

There is no doubt whatever that it was the intention of the Borough of Ashland through the officials then in office, to purchase from the plaintiff company these fire trucks for the use of the municipality. There is no question raised as to the delivery of the trucks, their being in accordance with the contract, or their performing the work which they were intended to do. On the contrary, we have the formal acceptance of the borough, the payment of the \$5000 cash and the payment of the first note. Why the other two notes were not paid does not appear and no defense is interposed to this action other than the technical defense hereinbefore set forth. We feel, for the reasons herein given, that the plaintiffs were entitled to the verdict of the jury in this case giving them possession of the trucks, but we felt at the time of the trial that to unqualifiedly direct a verdict for the plaintiff might result in injustice to the defendant, in that the plaintiffs would have the trucks and \$6933.33 of defendant's money, which had been paid on account thereof. We, therefore, in directing a verdict for the plaintiff stated that if the defendant borough would pay the balance; to wit, the two notes, one for \$1933.33 and the other one for \$1933.34, upon delivery of these trucks by the plaintiff to the defendant in the same condition in which they were at the time they were taken by the sheriff, that we would strike this judgment from the record.

It seems to us that this is the proper solution of the difficulty, at least it is honest and does injustice to neither of the parties and for that reason the order was so entered.

IN RE DETECTIVE'S LICENSE.

Detective—Proof Required—Act of May 23, 1887, P. L. 173.

Affirmative and convincing proof ought to be furnished to the Court that the applicant for a detective license has the proper qualifications.

What proofs are required under the Act of May 23, 1887, P. L. 173.

In the Court of Quarter Sessions of Lehigh County.
In re Petition of Clinton W. Roth for a license to conduct the business of a Detective.

Horace W. Schantz, for Petitioner.

Groman, P. J., October 15, 1917. Clinton W. Roth on September 5th, 1917, filed his application for a license to conduct the business of a detective under the provisions of the Act of May 23rd, 1887, P. L. 173. The Act provides that it shall and may be lawful for the Court of Quarter Sessions to issue a license upon payment of a fee of Twenty-five (\$25.00) Dollars, for the use of the county; the license to extend for the period of three years; to be revocable at all times by the court upon cause shown; no license to be granted until satisfactory proof of competency and integrity of the petitioner be made to the court; and a bond in the sum of Two Thousand (\$2,000) Dollars conditioned for the faithful and lawful performance of the duties of the appointment be given and executed by the petitioner. Under the terms of the bond any person injured or aggrieved by any unlawful act of the detective may bring suit thereon. The application was duly advertised as required by the provisions of the Act, and the matter came up for hearing on October 8th, 1917. From the testimony then submitted by the petitioner and now on file in this proceeding it appears petitioner is a reputable citizen of Allentown, Pennsylvania, and a man of large family. He is at present employed as a flagman by the Philadelphia and Reading Railway Company, earning One Hundred (\$100.00) Dollars per month, with

opportunities for advancement. The assurance was given to the court by the petitioner that eventually he expected to retire from the railroad service, and give his entire time and attention to the duties of the business of a detective.

During the last October sessions of criminal court, a constable who was also a detective licensed by this court, plead guilty to extortion, and was sentenced to pay a fine of Twenty-five (\$25.00) Dollars, costs and undergo imprisonment in the Lehigh county jail for the period of six months; imprisonment suspended. The court immediately issued a rule on the detective referred to to show cause why the license issued by this court should not be revoked. On October 8th last at a regular session of this court an application for a license was withdrawn by the petitioner who held a license for the last three years, after a number of witnesses were subpoenaed in opposition to the issuing of a license, and before hearing had. The court was thus led to investigate the construction placed on the Act by other courts in the state. Judge Endlich of Berks County in Smith's Petition, 5 District Reports, Page 467, in an opinion filed January 20th, 1896, uses the following language: "The applicant for a new license, under the Act of 1887, ought to furnish affirmative and convincing proof (to be weighed in connection with the judge's personal knowledge and observation of the applicant; Raudenbusch's Petition, 120 Pa. 328, 342; Kelminski's License, 164 Pa. 231) that he is a person experienced in the essentials of the business he proposes to engage in, acquainted with the methods and habits of criminals, familiar with the privileges and duties of officers charged with their pursuit and arrest, possessed of the requisite courage, moderation, coolness and integrity to act judiciously and efficiently in trying situations, mindful of the rights of citizens and the extent and limitations of the powers of peace officers, and that he is a person of unblemished character, free from objectionable habits and degrading associations, above the suspicion of having been or becoming implicated in blackmailing schemes or the bringing of prosecutions for the purpose of settlement and extortion, discreet, honest, truthful and reliable. The licensing of such a person can be of no menace to the public. The licensing of any other

sort can never be a public necessity, nor supposed to have been intended by the legislature. An applicant for the renewal of a detective's license ought to furnish similar proof that, during the term of his expiring license he has come up to the above requirements, both affirmative and negative. His license has not made him an officer of the court, and the latter cannot therefore be presumed to have official knowledge of the facts concerning him. There is no provision in the statute for relicensing without inquiry. Every application is a new one as regards the necessity of proof of competency and integrity."

Judge Halsey of Luzerne County in *Re Application of Fierro* for a detective license, 12 Luzerne Legal Register Reports, Page 278, in an opinion filed May 6th, 1904, took the same view of the application for a license as heretofore expressed by Judge Endlich.

Judge Bregy in the Court of Quarter Sessions of Philadelphia County in *Re Dickerson's Petition* for a license as detective, 5 Lackawanna Jurist, Page 292, on January 8th, 1904, in an opinion therein filed, uses the following language: "It is true the certificate of citizens attached to the petition is intended to supply the requirement of the act, to furnish to the court 'satisfactory proof of the competency and integrity' of the person applying. It is the court that is to be satisfied. The opinion of the others, as expressed by their signatures being to a paper is not to me 'satisfactory proof.'" In an opinion written by me in 1895 I expressed the same thought, in almost similar language. See *Burnett's Application*, 5 Dist. Reps. 3; also *Smith's Petition*, 5 Dist. Reps. 465. What was there decided is now reaffirmed."

The foregoing cited authorities indicate the construction placed upon the Act of 1887 by this court, and the practice to be followed in applications for a license for the purpose of conducting the business of a detective.

The testimony submitted in this application does not meet the requirements of the act so as to entitle the petitioner to a license. The testimony adduced is very creditable to the petitioner, but the proof does not go far enough.

Now October 15, 1917, application denied.

KAUTZ & STAPLES ET AL. v. BROTZMAN ET AL.

Equity—Jurisdiction—Adequate Remedy at Law—When and How the Question of Jurisdiction May be Raised.

Where defendants agree that, if the plaintiffs would forbear proceeding with their executions against a corporation, and would give ten days' time to the defendants for the purpose of taking over the property of said corporation by paying the debts, the defendants would pay the claims of plaintiffs in full; and where the defendants fail to comply with said agreement, and the personal property of the corporation is eventually sold by the sheriff, a court of equity has no jurisdiction, there being an adequate remedy at law, for the recovery of the balance due on the claims of the plaintiffs.

The question of jurisdiction in equity may be raised at any time before findings of fact and conclusions of law.

In the Court of Common Pleas of Monroe County. No. 14 May Term, 1916, in Equity. James Kautz and Arthur B. Staples, partners trading as Kautz & Staples, et al., v. Jacob R. Brotzman, Catharine Eilenberger and Frederick Schroeder. Bill in Equity. Answer. Bill dismissed.

G. B. Holmes, for Plaintiffs.

W. A. Erdman, for Defendants.

Groman, P. J., Thirty-first Judicial District, specially presiding. The plaintiffs filed a Bill in Equity in the Court of Common Pleas of Monroe County, Pennsylvania, as of No. 14 May Term, 1916, alleging that on the 26th day of June, 1915, they were creditors in various amounts of the Monroe Laundry Company, a domestic corporation, engaged in the steam laundry business; the corporation having its principal place of business at Stroudsburg, Pennsylvania; that said corporation on the day aforesaid was the owner of valuable personal property; that the capital stock of the corporation was pledged and held by the defendants herein as collateral security for indebtedness due the defendants by Nevil and Taylor, owners of said stock. It was further alleged that the corporation was insolvent and that prior to July 26th, 1915, a judgment or judgments had been secured against the corporation, Fi. Fas. were issued and the High Sheriff of Monroe County was about to sell the personal property. Before the day of sale it is alleged an agreement in writing was entered into by practically all the parties to this proceeding as individuals; the defendants herein

also acting in their individual capacity. In said agreement it was stipulated "that if the said plaintiffs would forbear proceeding with their said executions and would give ten days' time to the said defendants for the purpose of taking over the said property by paying the debts the said defendants would pay the claim of your orators in full." That the plaintiffs forebore to proceed with the executions as agreed upon, but the defendants failed and refused to carry out the terms of said agreement by then paying the claims due by said corporation to the complainants. It is further alleged that the personal property of the corporation was eventually sold by the High Sheriff of Monroe County, and after deducting costs, a proportionate distribution was made of the balance in the hands of the Sheriff to the creditors of the corporation. Complainants further allege they have no adequate remedy at law, and pray for equitable relief as follows:

(A) Discovery,

(B) and (C) Accounting,

(D) That the defendants pay to the complainants and the other creditors of the said company who may intervene the balance due upon their claims after crediting thereon all sums received by the complainants out of the proceeds of the Sheriff's sale of said personal property and hereinbefore referred to.

(E) General relief.

The defendants in the respective answers filed deny some of the matters set forth in the bill, admit others; and in paragraphs fourteen and fifteen deny the jurisdiction of a court of equity; that the complainants' bill fails to present sufficient facts which would entitle complainants to relief in a court of equity, further suggesting that complainants have a legal remedy. The answers raise the question of jurisdiction. A demurrer might have raised the question of jurisdiction more directly, but the question of jurisdiction may be raised at any time before findings of fact and conclusions of law: *Owens, Appellant, v. Goldie*, 213 Pa. St., Page 579 (1906). The question of jurisdiction may be raised by demurrer or by answer: *Gabriel v. Sedor*, 13 Luzerne Law Reports, Page 396; *Barnes v. Rea* (No. 2) 219 Pa. St., Page 287. In the case before us the question was raised when answers were filed by the defendants. Does a court of equity have

jurisdiction? The gist of the bill is the alleged agreement to pay certain debts and the refusal afterwards to pay the same, thus resulting in damages for breach of contract. The amount due each complainant is already fixed, and can thus easily be determined. The proof of damages suffered does not involve an intricate proposition of law, the rules of law being easy of application thereto and not at all inequitable. The damages sought to be recovered in this proceeding are not known as speculative damages, if they were, complainants' contention might be tenable: *Lee Lash Co. v. White*, 16 District Reports, Page 393. However, this not being the case, the court is of the view that complainants have a full, complete and adequate remedy at law. In support of this contention, without analyzing the authorities, we refer to the Appeal of the Pittsburgh and Connellsville R. R. Co., 99 Pa. St., Page 177; *Sprigg v. Commonwealth Title Insurance and Trust Co.*, 206 Pa. St., Page 548; *Graham v. Cummings*, 208 Pa. St., Page 516; *Holland v. Hallahan*, 211 Pa. St., Page 223; *Elk Brewing Company v. Neubert*, 213 Pa. St., Page 171, and other cases that might be cited. The principle involved is very clearly stated in an opinion filed in the Court of Common Pleas of Philadelphia County, Sitting in Equity, in *Van Dyke v. Wilson*, 22 Pa. Dist. Reports, Page 787, as follows: "Equity only lends its aid to prevent the inequitable application of rules of law, or else to afford a remedy where there is no remedy at law, or where the legal remedy, if any, is inadequate. From the supplementary character of the relief afforded by a court of chancery, it follows that, as a prerequisite to the exercise of its jurisdiction, there should be no adequate remedy at law."

Plaintiffs have a full, complete and adequate remedy at law, and equity will not attach.

Now September . . . , 1917, Bill dismissed.

IN RE ESTATE OF EMMA J. WEIDNER, DEC'D.***Collateral Appraisement—Notice of Filing—Appeal—Time—Valuation—Costs.***

The thirty days' limitation of the right to appeal from the collateral appraisement of an estate begins to run only from the time the notice of the filing of the appraisement is given to the parties interested.

Where no such notice is given, an appeal taken within thirty days of the knowledge of the filing of the appraisement is in time.

The valuation to be placed upon real estate of a decedent subject to collateral appraisement is as of the date of death of decedent.

The costs should be paid by the party through whose oversight or failure to perform a duty the costs were incurred.

In the Orphans' Court of Lehigh County. No. 49 October Term, 1916. In re Estate of Emma J. Weidner, deceased. Appeal from Collateral Appraisement.

Fred B. Gernerdt, for Appellants.

Robert L. Stuart, for Commonwealth.

Groman, P. J., November 19, 1917. Emma J. Weidner died January 5th, 1916, and on January 8th, 1916, John S. Seifing, Register of Wills of Lehigh County, appointed Max S. Erdman, Esquire, Appraiser, to appraise the real and personal estate of the decedent for the purpose of fixing the collateral inheritance tax. No notice of the appointment of an appraiser, of the time fixed for making the appraisement, or the filing of the appraisement after made by the appraiser, was given to the petitioners herein, Robert W. Heffner and Mary H. Schaffer, the next of kin and heirs at law of the decedent. On January 2nd, 1917, the petitioners appealed from the collateral inventory and appraisement of the real estate of said decedent to the Orphans' Court of Lehigh County, assigning as reasons therefor, first, that said appraisement failed to set forth the true taxable value of the items of real estate set forth in said appraisement; second, that no notice was received by the petitioners from the Register of Wills of said county of the making of said inventory and appraisement, or of the filing of such appraisement. Robert L. Stuart, Esquire, on January 2nd, 1917, entered his appearance as attorney for the Commonwealth of Pennsylvania, and on January 8th, 1917, presented a motion for the appointment of a commissioner to take depositions and report the same to the

court. The commissioner appointed, Richard W. Iobst, Esquire, on June 8th, 1917, filed the depositions taken, and the matter came up for argument on the first Monday of November last.

The appraisement was filed July 10th, 1916, no notice of an intention to make such appraisement or the filing of the same was given to the petitioners; the appeal from the appraisement was entered January 2nd, 1917, more than thirty days after the filing of the appraisement. The petitioners on December 22nd, 1916, first learned that such appraisement had been made and filed, and thereupon took this appeal. Was then the appeal to the Orphans' Court taken in time? In *Belcher's Estate*, 211 Pa. St., Page 615 (1905) where a somewhat similar question arose, the Supreme Court used the following language: "The first question is whether the appeal from the appraisement to the Orphans' Court was in time. The appraisement was filed July 21, 1902, but no notice given until July 28, and the executors entered their appeal on August 22. Did the time for appeal begin to run from the filing of the appraisement or from the date of notice? The statute is silent on this subject. Its language is that "any person or persons not satisfied with said appraisement shall have the right to appeal within thirty days to the Orphans' Court of the proper county." The time for appeal is thus limited to thirty days but the terminus a quo the thirty days are to run is not named, nor is there any express provision for notice. But the requirement of notice is necessarily implied in the right of appeal, for without notice the "party not satisfied" has no certain means of learning that the time for him to move has come, and the privilege of appeal would be nugatory unless he should be fortunate enough to discover the proceeding from other sources. The statute, it is to be noted, fixes no time or mode of procedure. The register of wills is to appoint an appraiser "whenever occasion may require" and the appraiser is only directed "to make a fair and conscionable appraisement." The manner and time of so doing is left to him. In the present case the appraiser was appointed in August and filed his appraisement in the following July. It does not appear that the legatees had any notice of the appointment and if they had it would be unreasonable to

hold them bound at the risk of losing their appeal, to resort to the register's office every thirty days during the eleven months the appraiser was taking his time about the matter. The proceeding was in no sense a judicial one, of whose successive steps parties were bound to take notice. In *Hadley's Estate*, 181 Pa. 339, it was said, "the statute makes no express provision for notice to them (the legatees) but it gives them the right of appeal, and it would therefore be proper if not requisite that the court should see that notice and a hearing are given. Without such notice and hearing, it is not consistent with the universal principles of law that the parties charged should be affected by the adjudication." The point was only incidentally touched in the case, and that was as far as it was necessary to go. But now that the question is directly raised we hold that notice of the filing of the appraisement is necessarily implied in the right of appeal given by the statute, and the thirty days' limitation of the right begin only from such notice."

From the foregoing we reach the conclusion that the appeal was taken in time.

The Act of May 6, 1887, P. L. 79, Section 12 relative to the duty of the court upon an appeal taken under the provisions of said act is as follows: "Upon such appeal, said courts shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme Court as in other cases."

In *Scherer's Estate*, 3 *Lehigh County Law Journal*, Page 372, Judge Trexler held that "upon such appeal the Orphans' Court has jurisdiction to determine all questions of valuation and of the liability of the person's estate for such tax." It thus devolves upon the court to pass upon the question of the valuation to be placed on the real estate herein involved. The valuation to be placed upon the real estate of a decedent subject to collateral appraisement is as of the date of death, that date fixes the status of the property: *Line's Estate*, 155 Pa. St., Page 378; *Handley's Estate*, 181 Pa. St., Page 346. The petitioners called a number of witnesses qualified to testify as to the value of the real estate; from the testimony the court determines the value of the same to be as follows:

House and lot No. 360 Main street, Kutztown, Pa. \$2800
 House and lot, Ringgold, Penna.....\$1000
 Five acres, more or less, Kutztown, Pa.....\$3500

Another matter to be determined is the question of costs in this proceeding. The petitioners should not be required to pay the costs of this proceeding; if they had been notified of the appointment and had a day in court, a different question might arise. The Register of Wills is the agent for the Commonwealth for the collection of collateral inheritance tax: *Powell, Auditor General, v. Sheehan*, 43 Pa. C. C., Page 378. The oversight of the agent in the line of the duties of his appointment would be the over-sight of the principal. The costs should be paid by the party through whose oversight or failure to perform a duty the costs were incurred, the Commonwealth.

Now November 19, 1917, the court determines the values of the real estate as follows:

House and lot No. 360 Main street, Kutztown, Pa. \$2800
 House and lots, Ringgold, Pa. 1000
 Five acres of land, Kutztown, Pa..... 3500

Total valuation\$7300

The costs in this proceeding to be paid by the Commonwealth of Pennsylvania.

BALTIMORE AND HARRISBURG RAILROAD CO. v. HANOVER AND M'SHERRYSTOWN STREET RAILWAY CO.

Bond—Death of Sureties—Jurisdiction.

To settle a controversy between a steam railroad company and a trolley company, concerning grade crossings, the latter gave a bond to cover all damages that might accrue at said crossings by reason of the negligence of itself, its officers, agents or employees. Subsequently there was a change of sureties, and when the second set of sureties were all dead, the plaintiff railroad company petitioned for a new bond. Held, that the petition must be granted.

There being no past or present claim during the life of the sureties, nor any credit which could have been obtained because of their names on the bond, it is plain that no liability under the bond now exists for which the sureties could be held liable.

The Public Service Act of June 26, 1913, P. L. 1408, provides that "nothing in this act contained shall in any way abridge or alter the existing rights of actions or remedies in equity or under the common or statutory law of the Commonwealth."

352 RAILROAD CO. v. STREET RAILWAY CO.

The decree providing for a bond issued out of a Court of Equity on August 30, 1893, and has been in force ever since. It is such a condition as the legislature apprehended when it passed the section (29) above referred to.

In the Court of Common Pleas of York County. No. 2, August Term, 1893. Rule to file bond.

George S. Schmidt, for Rule.
T. F. Chrostwaite, Contra.

January 14th, 1918. Ross, J. The essential facts of this case are as follows:

1. On August 30th, 1893, in a suit entered by the "Baltimore and Harrisburg Railway Company" and the "Western Maryland Railroad Company," as plaintiffs, against "The Hanover and McSherrystown Street Railway Company" as defendant, this Court entered a decree, relating to certain grade crossings, of which the following was a part.

"7. That the Hanover and McSherrystown Street Railway Company shall enter into a bond with surety or sureties to be approved by the Court conditioned to indemnify and save harmless the plaintiffs against all suits, actions, claims, demands and damages by all persons on account of any accident at either of said crossings occasioned by the negligence of said defendant, its officers, agents or employees, said bond to be in the sum of twenty thousand dollars, before constructing the said crossings, costs of equity proceedings pending to be paid by the Hanover and McSherrystown Street Railway Company."

2. On September 6th, 1893, the defendant, above named, in accordance with the above decree, filed in said Court its bond in the sum of twenty thousand dollars, with Charles E. Ehrehart, Samuel L. Johns, and Lewis D. Sell, as sureties, which bond was approved by the Court.

3. On March 1, 1909, the defendant filed its petition in court, praying that it be permitted to substitute a new bond for the said bond approved September 6th, 1893; on the same day the Court made an order and decree allowing the new bond to be filed in lieu of and as a substitute for the said bond filed on the 6th day of September, 1893, and discharging and relieving the above named sureties on said last mentioned bond from all further

liability thereon, which new bond in the sum of twenty thousand dollars drawn in conformity with the said decree made on August 30th, 1893, and signed by William H. Lanius, John W. Steacy and George P. Smyser, as sureties, was on said March 1st, 1909, duly filed in, and approved by the Court; counsel for the plaintiff consenting to the filing and approval thereof.

4. Subsequently, the said "Baltimore and Harrisburg Railway Company" and other railroad companies were merged with the said "Western Maryland Railway Company" under the laws of Pennsylvania, and consolidated into a single corporation by the name, style, and title of "Western Maryland Railway Company," possessing within the Commonwealth of Pennsylvania all the rights, privileges and franchises of each of the corporations so consolidated; among the rights and properties so acquired was the ownership and right to maintain and operate the railroad of the "Baltimore and Harrisburg Railway Company," at the crossings referred to in the said Court's decree of August 30th, 1893.

5. The said "Western Maryland Railway Company," now presents a petition averring "that all of the sureties on the bond of the above named defendant, filed in this court on March 1, 1909, are dead, said George P. Smyser and W. H. Lanius having respectively died on the 28th day of February, 1912, and on the 21st day of January, 1913, and their estates have heretofore been distributed in due form to the parties entitled thereto and are not subject to the lien of said bond. That the remaining surety, John W. Steacy, died on the 2nd day of March, 1917, and that the obligation of said bond will, at an early date, cease to be a lien upon the real estate of said last named surety."

6. The prayer of the petition is "That the Hanover and McSherrystown Street Railway Company, defendant in the said proceeding, be ordered and decreed to enter into and file with * * (this) Court, a bond with surety or sureties to be approved by the Court, conditioned to indemnify and save harmless your petitioner, the successor of the plaintiff in the above lien, against all suits, actions, claims, demands and damages by all persons on account of any accident at either of said crossings occasioned by the neglect of the defendant, its officers, agents

or employees, said bond to be in the sum of twenty thousand dollars."

7. The defendant's answer does not deny the averments of plaintiff's petition, but says, that the estates of the said deceased sureties have not been so distributed that the obligation which they signed as sureties has ceased to be a lien upon the real estate bound by it.

The answer also denies the right of this Court to require it to file another bond under the facts.

In support of the first proposition the defendant argues through its counsel, "that there is an engagement here to indemnify what may at any time occur, and that this engagement extends to the representatives of the sureties." An endeavor is made to support this argument by several cited authorities. Those citations are not deemed applicable to the circumstances of the present case. They tend to establish the principle that where a person becomes a guarantor that a contractor or covenantor will perform a definite and well defined thing for consideration in a specified time, and fails in the performance of his promise, the surety or his estate may be held liable for the known and estimated amount of loss.

The case now being considered involves no past or present actual claim during the life of the bond nor does it involve any credit which could have been obtained because of the names on the bond as sureties. "Sureties are viewed with a favorable eye, both in law and equity. They should be held to the performance of what they clearly agree to do; but they ought not to be charged by strained construction, and on doubtful conjecture;" *Weaver v. Shryock*, 6 S. & R. 264.

That the sureties on the bond in question are all dead, and that the principal obligor is cognizant of that fact, is made plain to the Court by the admissions made in the answer filed in response to the averments contained in the relator's petition.

It is also plain that no liability under the bond now exists, for which the sureties could be held liable. From those obvious facts, and from an inspection of the bond itself, the contract mentioned in the bond is an executory one; and the liability is yet to arise which could hold any of the sureties on the bond or their estates liable. That the estates of the deceased sureties have been disposed of

by actual distribution under legal process and by will, are matters of record of which this Court has official knowledge. We are, therefore, of the opinion that the liability of each of the deceased sureties on the bond was terminated by death; and the personal representatives or the estates of said deceased sureties could not be held under the present contract when viewed by the facts of this case; 32 Cyc. p. 85, pl. 6; *Slagle & Co. v. Ambrose et al., Executors*, 1 Mons. 30; *Weaver v. Shryock*, 6 S. & R. 262; *Stoner v. Stroman*, 9 W. & S. 85; *United States v. Eli R. Price*, 50 U. S. 82; *Guy v. Ward et al.*, (Conn.) 34 Atl. 1025; *Eben D. Jordan v. Elizabeth Dobbins, Admrs.* (Mass.) 122 Mass. 168; *Coulthart v. Clementson*, (Eng.) V Queen's Bench 42.

The argument advanced in support of the second contention is, that under the 12th section of Article V of "the Public Service Company law," approved June 26, 1913, P. L. 1408, this Court has no jurisdiction to determine the present contention. That section reads as follows: Except in cases in which grade crossings are in process of abolition at the time of the passage of this Act, under agreement or contract with a municipality, as set forth in the proviso of section five of article three of this act, the commission shall have exclusive power to determine, order and prescribe, in accordance with plans and specifications to be approved by it, the just and reasonable manner, including the particular point of crossing, in which tracks or other facilities of any public service company may be constructed across the tracks or other facilities of any other public service company at grade or above, or below grade, or at the same or different levels; or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade; and to determine, order and prescribe the terms and conditions of installation and operation, maintenance and protection of all such crossings which may now or hereafter be constructed, including the stationing of watchman thereat, and the installation of lights, block or other system of signaling, safety appliances, devices, or such other means or instrumentalities

as may to the commission appear reasonable and necessary to the end, intent and purpose that accidents may be prevented and the safety of the public promoted. No such crossing shall be constructed without the approval of the commission, evidenced by its 'Certificate of Public Convenience,' as provided in section five of article three of this act; but in no case shall the approval or consent of any court, board, or other commission or officer, or of any municipality, be necessary therefor.

"It shall be proper, however, for the commission, by general rule or order, whenever the same can be properly regulated by suitable general rule, to prescribe the terms and conditions under which such crossing may be constructed, operated, maintained, or protected without the particular approval of the commission." * * * *

The act (Sec. 12) also says the commission shall have exclusive power to order "any crossing aforesaid, now existing or hereafter constructed" * * * "to be relocated or altered, or to be abolished," * * * *

The same section provides for "compensation for damages which the owners of adjacent property taken, injured, or destroyed, may sustain in the construction, relocation, alteration, or abolition of any such crossing specified in this section."

A diligent perusal of that section fails to sustain the respondent's contention.

The decree, upon which the relator's application is now made and is based upon was made August 30th, 1893. It is a mandatoy order which issued out of a Court of Equity and has been in force ever since. It is reasonable to believe that it is such a condition as the legislature apprehended when it excepted from the operation of the act the abridgement or impairment of any of the obligations, duties or liabilities of any public service company in equity or under the existent common or statutory law of the Commonwealth, when it provided in Section 29 of the same article that "such obligations, duties, and liabilities shall be and remain as heretofore. "And * * * nothing in this act contained shall in any way abridge or alter the existing rights of actions or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this

act shall be cumulative, and in addition to such rights of action and remedies;" P. L. 1419.

There is no request now to have any of the requirements of the decree made in this case abridged, or altered, and nothing is requested which would tend to change existing actions or remedies in equity; but we are only asked to do that, which in effect, would be an enforcement of the terms of the decree of the court of equity, made on the 30th of August, 1893. That there can be no lack of equity in this proceeding, is evidenced by the fact that a similar request was made by the defendant to this Court on the 1st day of March, 1909, and was granted without any objection by the plaintiff, when the bond with sureties as originally approved by the Court was changed by the substitution of the sureties who are now all dead and, as we have before observed, are no longer liable for the fulfillment of the terms of the decree.

It is deemed just and equitable that the prayer of the petition be granted and therefore the rule granted is hereby made absolute.

WORST v. DEHAVEN ET AL.

Wills—Construction—Joint Tenancy with Survivorship.

A testator devised his real estate to his four children naming them, "to have and to hold the same and take and divide, share and share alike, the rents, issues and profits thereof, during the lifetime of them or the survivors or survivor of them. And at the death of survivors or survivor of them I give and devise the same to my grandchildren per stirpes, their heirs and assigns."

Held that the will created a joint tenancy with the right of survivorship and on the death of one of the children, his only child was not entitled to his father's share of the rents, issues and profits, during the lifetime of any of the testator's other children.

In the Court of Common Pleas of Lancaster County, June Term, 1917, No. 50. Rule for Judgment for Defendant.

Frank S. Groff and Coyle & Keller, for Rule.
John E. Malone, Contra.

January 5, 1918. Opinion by Hassler, J. This is an application by the defendants, for judgment, under Sect. 20 of the Act of May 14, 1915, P. L. 483. The plaintiff

filed his statement and the defendants, in their affidavit of defense, raised a question of law, which, upon the application of the defendants, both parties have submitted to the judgment of this Court.

The plaintiff's claim is for one-fourth of the rents, issues, and profits of certain real estate, which have accrued since the death of Susan S. Worst, widow of Henry Worst, deceased.

Henry Worst died July 22, 1907, leaving a will dated October 23, 1905, which has been duly probated. The fifth item of this will is as follows: "Fifth: At the death of my said wife, 'I give and devise' my real estate to my four children, to wit, Catharine E. DeHaven, nee Worst, S. Clayton Worst, Annie M. Worst, and Harry L. Worst, to have and to hold the same and take and divide, share and share alike, the rents, issues, and profits thereof, during the lifetime of them or the survivors or survivor of them. And at the death of the survivors or survivor of them I give and devise the same to my grandchildren per stirpes, their heirs and assigns."

Susan S. Worst, the widow, died July 15, 1913. S. Clayton Worst died February 20, 1910. The other three children of the testator are living, and are the defendants in this proceeding. Leroy Worst, the plaintiff, is the only child of S. Clayton Worst, and, as such, claims the share of the rents, issues and profits of the real estate of the testator, to which his father would have been entitled, under the fifth item of the will, if he was living.

It is conceded by both plaintiff and defendants that the right of the plaintiff to recover depends upon the construction of the item of the will which we have quoted. If the bequest of the land to the four children of testator created a joint tenancy in it, with the right of survivorship, S. Clayton Worst's interest in it, which became vested at testator's death, ended at his own death, and the plaintiff would take nothing through his father, so that he could recover nothing in this proceeding, and the judgment would have to be in favor of the defendants.

As to construing a will, it is said in the opinion of the Court below, which is adopted by the Supreme Court as its opinion, in *Lewis's Estate*, 203 Pa., 219, "In the construction of wills the great and controlling rule is that the actual intent of the testator shall prevail. It has

been often said, as the learned auditing judge in this case has indicated, that in expounding a will the question is not what the testator meant, but what is the meaning of his words. 'But,' says Mr. Justice Mitchell (in Woelper's Appeal, 126 Pa. 562), 'by this it was never intended to say that the testator's meaning when apparent can be disregarded, but that it cannot be got at aliunde by what he might have meant, or even what under the circumstances perhaps he would have meant, but only by what he said. The search is confined to his language but its object is still his meaning.' " In Recks's Appeal, 78 Pa. 435, Justice Sharswood said, "It is a rule of common sense as well as law not to attempt to construe that which needs no construction." Now what did the testator intend, as shown by the language used? If his intention is apparent it cannot be disregarded, and if, in his language the intention is clear it needs no construction.

He said that his four children, naming them, were "to have and to hold" all his real estate "during the lifetime of them or the survivors or survivor of them." The same intention is apparent if we concede that these words limit the time, until which, they were to divide, share and share alike, the rents, issues, and profits of the same, as they were to have and to hold the real estate only for that purpose, and their holding of it would end when the purpose of holding it no longer existed. The words "take and divide, share and share alike, the rents, issues, and profits thereof," do not add to or take from the bequest of the land to testator's children, as the bequest of the legal estate in it, to them gave them the rents, issues, and profits of it during the time they were to have and to hold it. These words would be important if the legal estate was given to a trustee to distribute the income of it, as is the case in the cases cited by the plaintiff's attorney. In this will they were simply, though unnecessarily, used to emphasize the intention of the testator that his children were to have and to hold his real estate in equal shares during the time they were to have and to hold it, that is, during their lives, or the life of the survivors or survivor of them. His intention as to his grandchildren, of whom the plaintiff is one, is clearly shown by the succeeding words of the will, which are, "and at the death of the survivor or survivors of them,

I give and devise the same (which includes the rents, issues, and profits) to my grandchildren per stirpes, their heirs and assigns." The intention that they were to have no interest in or arising from the testator's real estate during the life of the survivor of his children is clear, and not doubtful, as the enjoyment of any such interest is postponed, to commence upon the happening of the death of the survivor of his children, and this intention is clearly expressed.

We are of the opinion that *Jones v. Cable*, 114 Pa. 586, clearly rules the question here in controversy. In that case the words of the will were, as they appeared in the opinion of the Court, "I give and bequeath unto my two sons John and Edward Cable, all my farm after my death to them as long as they do live, and after their death to their children." It will be observed that nothing is said about the survivor of his two sons, but it is necessarily implied. It will also be noticed, that the right of the devisee's children is postponed until after "their" (his two sons) death. John Cable died, and ejectment was brought against Edward Cable, the survivor, who was in possession of the farm, to obtain John's portion of it. Justice Paxson, in deciding the case, says, "Our construction of this will is that John and Edward take a life estate, with remainder to their children as purchasers, upon the death of the survivor. It is plain that this was the intention of the testator, for the devise over to the children does not take effect until after "their" death, which evidently means the death of the survivor. It is true the Act of 1812 has abolished joint tenancy in this state, but that act has never been held to prevent a testator creating a joint tenancy by the express language of his will, or by necessary implication. On the contrary it was held in *Arnold v. Jack's Executors*, 24 Penn St. R., 57, that while survivorship as an incident to joint tenancy was abolished by the Act of 1812, it may be expressly given by will or deed. The third survivorship results as a necessary implication from this will, so far as the life estate is concerned, and as Edward Cable has survived John, and is still living, it is clear the plaintiffs cannot recover the possession of any portion of this farm at present, whatever may be their rights upon the death of Edward."

Applying that case to the facts in this one, we see that the four children of the testator took a joint life estate with the incident of survivorship expressly given by the will. It was within the power of the testator to create such an estate with survivorship incident to it, even though joint tenancy with survivorship incident to it has been abolished by the Act of 1812. When S. Clayton Worst died all the interest he had in the rents, issues, and profits of the land, and in the right to have and to hold the land itself, went to his survivors, and the plaintiff inherited nothing through him. The plaintiff's interest in the land, as a grandson of the testator, is expressly postponed to take effect at the death of the survivor of the testator's four children. The construction contended for by him, if allowed, would defeat this clearly expressed intention of the testator that he, with the other grandchildren, were only to take the real estate at the death of his four children, and then as purchasers, and not through their parents.

The case of *Jones v. Cable* but repeats a principle declared in prior cases, and is followed without deviation in many later cases, among the more recent of which are, *Redemptorist Fathers v. Lawler*, 205 Pa. 26; *McCallum's Estate*, 211 Pa. 280; *Goldstein v. Hammell*, 236 Pa. 308, affirming 49 Sup. 39, and *McClement's Appeal*, 2 Sup. 443.

The recent case of *Maxwell's Estate*, 67 Sup. 63, upon which plaintiff relies, has no application, for the reason that in it the legal estate is separated from the equitable, by the former having been given to a trustee, and also because the testator expressly provided that "the issue of any deceased child is to take its parent's share." In *Spang's Estate*, 49 Sup. 315, the legal and equitable estate are separated, as is also the case in *Goldstein v. Hammel*, 49 Sup. 39, affirmed in 236 Pa. 305. In both it is decided that there was no joint tenancy.

Being of the opinion that under the will of Henry Worst, deceased, the plaintiff is not entitled to receive a share of the rents, issues, and profits of the testator's real estate, during the lifetime of any of his four children, we enter judgment for the defendants.

Judgment for the defendants.

ESTATE OF THOMAS GRENBOWSKI.

Specific Performance—Acts of February 24, 1834, P. L. 75; 1889, P. L. 157.

The Act of February 24, 1834, P. L. 75 provides for legal representatives of a decedent or the purchaser of real estate or other person interested to have specific performance of a written contract.

The Act of 1889, P. L. 157 requires that notices shall be given the heirs when an application of this nature is made.

A bill for specific performance must show that the decedent contracted in writing to sell or convey his real estate or that he authorized another to contract for him; that the decedent received part of the purchase money and that he had knowledge of the contract.

Petition for Specific Performance. O. C. of Schuylkill County.

Carl H. Wagner, for Petition.

Wilhelm, P. J., January 21, 1918. This is the application of Edmunda Gross, administratrix, for a decree of specific performance of an alleged agreement of sale, entered into by the decedent, praying for an order to execute and deliver a deed in fee simple to the purchaser certain real estate upon the payment of the balance of the purchase money.

The petition sets out that Thomas Grenbowski died seized of a piece of real estate, known as No. 2951 Alter Street in the City of Philadelphia, and that the decedent through his duly constituted agent entered into a written contract with one Edward Mowbray for the sale and conveyance of said premises for the price or sum of Nine Hundred Dollars, and that a copy of the contract is attached to the petition and marked Exhibit A.

That the contract has since been assigned by the purchaser to Frederick R. Gerry for whom the purchaser was acting as agent in said transaction.

The petition also contains the allegation that twenty-five dollars was paid at the time of the execution of the contract, and seventy-five dollars was subsequently paid on account of said purchase money.

There is no allegation that any of the money paid in pursuance of this contract was received by the decedent.

It is presumed that the Act of 24 February, 1834, section 15 P. L. 75, is relied upon to secure the order prayed for. This section of the act provides: "Whenever

any person shall, by a bargain or contract in writing, bind himself to sell and convey any real estate within this Commonwealth, and shall die, seized or possessed of such real estate, without having made any sufficient provision for the performance of such bargain or contract, it shall be lawful for the executors or administrators of such decedent, or for the purchaser of such real estate, or other person interested in such contract, to apply, by bill or petition, to the Orphans' Court having jurisdiction of the accounts of such executors or administrators to decree the specific performance of such contract."

The difficulty here lies in the fact that this decedent did not contract in writing to sell his real estate. Exhibit A attached to the petition shows that the contract was executed by Thomas A. Mullen, Agent, of the first part, and Edward Mowbray of the second part.

There is nothing in this petition to show that the decedent contracted in writing to sell or convey his real estate or that he authorized any person to contract for him. It is not alleged that the decedent received any part of the purchase money, neither is it shown that he had any knowledge of this contract.

When this petition was presented, counsel stated that under the authority of *West Hickory Mining Association v. Reed*, 80 Pa. 38, it is unnecessary to give notice to heirs when an application of this character is made, and it is presumed that relying upon that authority no notice was given, and it is not the intention of the petitioner to give notice to the heirs of the decedent.

The Act of 1889, section 1, P. L. 157, requires that notice shall be given to heirs when an application of this nature is made.

It is improper to grant the prayer of this petition upon the ground that the decedent entered into a parol contract for the conveyance of his real estate. There is no proof or offer that a parol contract was entered into. Neither is there any allegation that the contract has been so far executed that it would be against equity to rescind it.

The petition shows that the decedent did not enter into a written contract to sell his real estate. It does not show that he entered into a parole contract to make a

sale. No notice has been given to the heirs of this application as the law requires, therefore, the application should be refused.

And now January 21, 1918, the petition is dismissed at the cost of the petitioner.

QUINTER v. QUINTER.

Practice C. P.—Jury Trial—Failure to Except to Charge of Court—Subsequent Allowance of Exception by Court—Act 11 May, 1911, Sec. 2, P. L. 279.

The Court, in the exercise of its discretion under Sec. 2, Act 11 May, 1911, P. L. 279, will, in a proper case, allow an exception to the charge of the Court even after verdict; though, no exception having been asked for at the trial, the exception entered subsequently involves no certification that there was such a request, as in the case of exceptions generally.

Same—Statutes—Interpretation—Punctuation.

Punctuation is not a controlling part of any enactment, yet it has been repeatedly held that it may be looked at as some indication of meaning. It is probably safer in the interpretation of a statute like this to adhere to the exact language used, as punctuated, especially where the right thereby given is the broader right and makes in favor of the possibility of a review by the appellate courts of the action at nisi prius.

In the Court of Common Pleas of Berks County. No. 34 January Term, 1916. Rule for exception to charge of Court.

Walter S. Young, Wm. J. Rourke and W. B. Bechtel for Defendant and Rule.

Henry S. Green and Lee Friday for Plaintiff.

Opinion by Endlich, P. J., November 5, 1917—As mentioned in the decision discharging the rule for a new trial in this case: 9 Berks Co. L. J. 184, there was no exception taken or asked for to the charge of the Court at the time when it was delivered. After the refusal of a retrial, defendant moved that an exception be noted in her favor to the charge, and this rule was granted to show cause why it should not be done. The allegation of the petition that a request for an exception was addressed to the stenographer in the hearing of the Court was denied by the answer filed to the rule, and, incorrect in point of

fact, was on the argument distinctly abandoned by defendant's counsel. Nevertheless it is insisted that the Court has a discretion still to grant the exception under Section 2, Act 11 May, 1911, P. L. 279 (unaffected, for present purposes, by the amendatory Act 5 June, 1913, P. L. 421). It was so held in *Allison v. Water Wheel Co.*, 27 York 203, and apparently so considered in *Com. v. Duffy*, 49 Pa. Super. Ct. 344, and there seem to be no authoritative decisions to the contrary. The section in question provides as follows:

"Exceptions may be taken, without allowance by the trial judge, to any part or all of the charge, or to the answers to points, for any reason that may be alleged regarding the same in the hearing of the Court, before the jury retires to consider its verdict, or, thereafter, by leave of the Court; and they shall be thereupon noted by the official stenographer. . . ."

It will be observed that this language can be read in two ways. Read strictly according to its punctuation in the pamphlet laws, it would appear that the requirement of a request for an exception in the hearing of the Court applies only where it is made before the jury retires and where there is no allowance of the exception by the Court; and that it has no reference to the noting of an exception after the retirement of the jury and by leave of the Court. Disregarding the punctuation, or inserting a comma between the words "same" and "in," the meaning of the clause would seem to be that, whether asked before or after the retirement of the jury, in any event there must be a request for an exception made in the hearing of the Court. In other words, upon the strict wording of the statute, including its punctuation, the "leave of the Court" to enter an exception after the jury's retirement would appear not to depend in any degree upon the exception having been asked for and the reasons stated before its retirement in the hearing of the Court. Whilst punctuation is not a controlling part of any enactment: *Hammock v. Loan Co.*, 105 U. S. 77; *Gyger's Est.*, 65 Pa. 311, 312; *Com. v. Shopp*, 1 Woodw. 123, 129, yet it has been repeatedly held that it may be looked at as some indication of meaning: See U. S. v. *Three R. R. Cars*, 1 Abb. U. S. 196; *Albright v. Payne*, 43 Ohio 8; *Squires' Case*, 12 Abb. Pr. (N. Y.) 38. Much may

perhaps be said in favor of holding to the view that it was intended to make the request for an exception in the hearing of the Court indispensable in order to justify the latter in subsequently allowing an exception. But on the other hand a good deal may be said on the other side; and there may be valid reasons for the distinction made by the statute in this respect between exceptions taken without allowance by the Court and those entered by its leave. At all events it is probably safer, in the interpretation of a statute like this, to adhere to the exact language used, as punctuated, especially where the right thereby given is the broader right and makes in favor of the possibility of a review by the appellate courts of the action at nisi prius. It is very apparent that an exception entered by leave of the Court under the enactment referred to is different from an exception as heretofore understood. It being presupposed that no exception was asked for at the trial, the exception entered subsequently under the Act of 1911 involves, of course, no certification that there was such a request, as in the case of exceptions generally: See *Penna. R. R. Co. v. Reading*, 7 Berks Co. L. J. 147, 24 Distr. R. 855, and cases there cited.

Our conclusion is that we ought to hold that the power to permit an exception at this time is discretionary, and that that power should be exercised, unless it involves palpable injustice to the other party. That is not clear in this instance. There has been considerable delay on the defendant's part in moving for the exception; but it does not appear that any injury or inconvenience has resulted or is likely to result to the plaintiff. Even had an exception to the charge been taken and noted at the trial, the final hearing and disposition of the cause on appeal would not, in the regular course of procedure, have been possible any sooner than it is now.

The rule to show cause is made absolute, and the stenographer is directed to note an exception in favor of the defendant to the charge of the Court.

HOLLANDER v. DAWSON CONSTRUCTION CO.*Negligence—Automobiles—Damages to Car—Measure of—Repairs and Depreciation—Hiring.*

In an action for damages to plaintiff's automobile as a result of defendant's truck running into it while standing on the street, it is proper as a measure of damages to introduce evidence as to the expense to which plaintiff was put by hiring another automobile while his car was being repaired, the cost of the new parts and repairs and also the depreciation of the car due to the accident.

On a motion for a new trial, the court will not assume that there was error in the charge of the court or in the admission or rejection of testimony when counsel, who makes the motion, fails to furnish the court with a transcript of the record as taken at the trial.

Motion Ex Parte Defendant for New Trial. No. 703
April Term, 1916. C. P. Allegheny County.

Julius Spatz, for Plaintiff.

H. Fred Mercer and Diamond & Zacharias, for Defendant.

Reid, J., November 27, 1917. This is a motion on the part of defendant for a new trial.

This action was trespass to recover for damages sustained by plaintiff through the collision of a large automobile truck, operated by defendant's employe, and engaged at the time in its service, with the plaintiff's automobile.

As a result of the collision, plaintiff, who is a physician, was obliged, at a large expense, to hire another car for use in his professional calls pending the completion of repairs to his own car, which was badly damaged, requiring over two weeks' time.

In addition to this item, plaintiff paid a large sum for new parts and repairs, for which he claimed, and also claimed damages for depreciation in the value of his car, resulting from the accident, and existing over and above the costs of repairs, his contention being that the automobile was new some four months before the accident and that its value was greatly reduced by the injuries it received.

The collision occurred about 10 P. M. in one of the best lighted streets in East Pittsburgh. The plaintiff's car, with headlights burning, was standing in front of the plaintiff's office and was in plain view to any one driving an automobile or other vehicle through that street.

The defendant's employe, driving a large automobile truck, hauling a load of some kind of building material or other property for the defendant, through his negligence, as the jury determined, ran the automobile "head-on" into the plaintiff's car.

The driver explained the accident as due to his having to turn his head and extend one hand towards the rear of the auto truck to hold some part of the load from slipping, and while thus momentarily diverted, the truck deflected and collided with the plaintiff's car.

So far as the negligence of the defendant's employe is concerned, there could be no great controversy, and the jury was warranted in finding, as it did, that such negligence caused the injury complained of.

The jury rendered a verdict for plaintiff in the sum of \$710.65.

The first reason for a new trial is that the verdict is excessive, and in excess also of the amount of damages claimed by the plaintiff.

It exceeds by \$111.00 the aggregate of the expenditures for hire of a machine and the cost of parts and repairs presented by the plaintiff's statement, and as to which he offered proof—but is not in excess of the total damages claimed as appears by the statement, which are stated to have been \$1,200.00.

The question of depreciation was submitted to the jury, and there is no accurate method of determining how much was allowed for each of the items entering into the result.

There was evidence from which the jury could have found the amount of its verdict, and as the total verdict was less than the total damages claimed, there is nothing apparent in the pleadings to sustain the reason under consideration—and as to the evidence of plaintiff, it was sufficient, as we recall it, if the jury believed it, to support the verdict.

The first reason, therefore, cannot be sustained.

The second reason is that the verdict is against the weight of the evidence.

If this refers to the evidence to support the averment of defendant's negligence, the weight was beyond question, with the plaintiff.

If it refers to the weight of the evidence as to the

amount of the damages, including the cost of having another car, cost of parts and repairs and the allowance of a sum for depreciation, we cannot from memory, recall the details, and defendant has not furnished us with a transcript of the testimony. Our impression, however, is that there was no preponderance on that subject in favor of the defendant, and, as it was purely a question of fact, upon which the jury, after careful consideration, passed, we shall not now overthrow their conclusions upon the matter.

The third reason is that the verdict was against the charge of the Court.

Not having been furnished with a copy of our charge, and not recalling from memory the details of our instructions, we cannot accurately pass upon this reason. We are under the impression, however, that the whole matter in controversy was left to the jury, with adequate instructions upon every question raised, and we cannot now say that our charge was disregarded.

The fourth reason, "that the Court erred in not submitting to the jury the fact whether or not the damages alleged to have been sustained by the plaintiff were caused by defendant's negligence," is, if supported by the record, of vital importance.

Unless the evidence of such negligence was uncontradicted, or unless the liability of the defendant was admitted by the defendant, or his counsel, the Court in ignoring the matter and failing to submit the question to the jury would certainly be in great error.

However, not having been furnished with a transcript of the charge, as previously stated, and not having reason to believe that the Court was so forgetful of the defendant's rights, we shall not now assume that we erred, and, therefore, cannot sustain the fourth reason.

The fifth, sixth and seventh reasons for a new trial allege errors committed by the Court, either in its charge to the jury or in its admission of certain evidence. These cannot in the absence of the charge and the testimony be sustained.

We assume that had counsel intended to rely upon any of the foregoing reasons, based upon the testimony or the charge of the Court, a transcript both of the testimony and the charge, would have been furnished to us.

We believe that the case was fairly submitted by presenting to the jury a review of the salient facts on both sides, and of the theories of plaintiff and defendant, with a reference to the testimony of the witnesses, supporting both the plaintiff's and defendant's positions, and we see no reason to now disturb the verdict.

The motion for a new trial is, therefore, refused.

KIRBY'S ESTATE.

Decedents' Estates — Wills — Partial Intestacy — Widow's Claim Under Intestate Laws—Act 1 April, 1909, P. L. 87.

Testator devised to his widow a life estate in the whole of his estate, real and personal, but failed to make disposition of a portion of his personal estate after her death, there being therefore a partial intestacy. Testator left no issue, and the widow, in addition to the life estate given her by the will, claimed under the intestate laws the \$5,000 given by the Act of 1909, and one-half of the rest of the personal property absolutely. Held: that the Act of 1909 has always been regarded as part of the intestate laws, and applies whether there is a total or partial intestacy; that the widow's rights at law having vested at testator's death, she, being also the life tenant, is presently entitled to the distribution asked for.

In the Orphans' Court of Berks County. Widow's claim for exemption under Act of 1909.

Snyder, Zieber & Snyder for Accountant.

Opinion by Schaeffer, P. J., November 17, 1917. The decedent died on the 1st day of September, 1916, testate, married and without issue, leaving to survive him a widow, Mary M. Kirby, and having, by his last will and testament, disposed of that part of his estate embraced in the account as follows:

"Second. I give, devise and bequeath to my beloved wife Mary, all my estate, real, personal and mixed of whatsoever kind and wheresoever situate, to have and to hold the same and to receive and enjoy the rents, issues, income and profits therefrom for and during the term of her natural life, and at and upon her decease I give and devise and bequeath the same as follows, that is to say:

"Third. At and upon the decease of my said wife Mary, I give and devise unto Gordon Miller, son of my brother-in-law Edward Y. Miller, my farm No. 1 which I

inherited from my grandfather, situate in Maidencreek Township, Berks County, . . . to have and to hold the said farm and tract of woodland for and during the term of his natural life, . . .

"Fourth. At and upon the decease of my said wife Mary, I give and devise to Gordon Miller, son of my brother-in-law Edward Y. Miller, my farm No. 2 which I inherited from my uncle, Solomon Kirby, situate partly in Maidencreek and partly in Richmond Township, Berks County, Pennsylvania, . . . and also a certain tract of woodland situate partly in Ruscombmanor and partly in Richmond Township, . . . to have and to hold the said farm and tract of woodland for and during the term of his natural life, . . .

"Fifth. At and upon the decease of my said wife Mary, I give, devise and bequeath to Gordon Miller, son of my brother-in-law Edward Y. Miller, my homestead which I now occupy, situate partly in Maidencreek and partly in Richmond Townships, adjoining the above named farms Nos. 1 and 2, containing fifteen acres, more or less, together with all and singular the furniture and household goods therein, he, the said Gordon Miller, to have and to hold the said homestead and tract of land and furniture and household goods therein for and during the term of his natural life and to keep the same in the same order and repair and without diminution as I kept it during my lifetime, and at and upon his decease I give, devise and bequeath the said homestead and tract of land and furniture and household goods therein as above mentioned to the children of the said Gordon Miller, in equal shares, the issue of any deceased child or children to take the same share as their parent would if living; but should the said Gordon Miller die without any issue living at the time of his decease, then I give, devise and bequeath the said homestead and tract of land and furniture and household goods to his nearest blood relations living at the time of his decease, share and share alike. I order and direct that the two large clocks and pictures shall remain in the house and descend with the real estate devised in this paragraph."

The account contains the proceeds of personal estate, principal and income. Of principal, the balance for distribution is \$6,777.10, and of income, which has accrued

since testator's death, \$155.29. The funds will be distributed separately.

Included in the principal balance are the furniture and household goods in the homestead, situate partly in Maidencreek and partly in Richmond Townships, valued, as appears by the inventory, at \$219.25.

With regard to the distribution of the balance, which is personal, it appears by the will that there is a partial intestacy. Having given the whole of his estate to his widow for life, which included all his real estate, testator failed to make a disposition over of the major portion of his personalty. This portion embraces all the personal estate, except the household effects in the homestead, appraised at \$219.25. In these circumstances, Mary M. Kirby, the widow, has elected to take, not only by virtue of her life estate in both the real and personal property under the will, but also her interest in the personal estate under the intestate laws.

That she is entitled to immediate distribution of whatever interest she has in the fund under the law, is decided by Freeman's Estate, 227 Pa., 154, where it is said that such interest vested in her immediately at the death of testator; and that, consequently, she can, if she so desires, have it set aside for her absolutely.

She, therefore, asks out of the principal here, first, for distribution to her for life of the homestead furniture and household goods, appraised at \$219.25, as to which there is no intestacy. What remains constitutes that estate as to which there is an intestacy after her death; and of this—testator having left no issue—she asks that there be distributed to her \$5,000.00, previously appraised to her under the provisions of the Act of 1909; and of the balance, one-half to her for life, under the will, and the remaining half to her absolutely, under the intestate laws. She also asks for all the income, which has accrued since testator's death. Thus, the question naturally arises, is the widow, in view of her acceptance under the will of her life estate in all the real estate, also entitled to take her rights at law in the personal estate and a life estate in the remaining personalty? In other words, is she in addition to all her other rights entitled to take \$5,000.00 under the Act of 1909?

The Act of 1833 provides for the descent and dis-

tribution of real and personal estate, after payment of debts, "which shall not have been disposed of by will." Of such of her husband's estate as remained undisposed of by will, where there is no issue, that act gave to the widow one-half of his real estate for life and one-half of his personal estate absolutely. In the distribution of estates ever since that provision has been invariably carried out with respect to widows wherever there has been an intestacy, in whole or in part. The Act of 1909 in nowise narrowed or restricted the estate out of which she is to take. Following the language of the prior act, it also designated the real and personal estate she is entitled to as that "which shall not have been disposed of by will." And of that, where there is no issue, it simply gave her more than the prior act—"real or personal estate, or both," to the aggregate value of \$5,000.00. In anything above that, the Act of 1909 gave her the same proportions as those given her by the Act of 1833.

Both acts relate to the intestate laws of Pennsylvania. Ever since its passage, the Act of 1909 has been regarded part of the intestate laws of the Commonwealth: Guenthoer's Estate, 235 Pa., 67; the supreme court there saying, moreover, that the act "dealt with and included estates which were taken by widows by virtue of the intestate laws of the Commonwealth, whether there was a total or partial intestacy." That fixes the widow's rights in the case of partial intestacy. It was followed in Roger's Estate, 21 D. R. 1006, where testator disposed of his real estate without mentioning his personal estate at all, and the court cited Guenthoer's Estate as authority for distributing to the widow \$5,000.00 out of the personalty under the Act of 1909. Between Roger's Estate and this one the only difference is the intervening life estate of the widow here. But that difference is immaterial. For her rights at law having vested at testator's death the widow, being also the life tenant, can, if she so desires, have them set apart to her immediately: Freeman's Estate, *supra*. That she has elected to do.

Under the authorities, therefore, the court thinks the widow is entitled to the distribution asked for; and it will accordingly be made to her.

Distribution of the personalty directly to her for life,

will be made on condition that she furnish security, to be approved by the court, for the protection of the remainder interests: Kemmerer's Estate, 251 Pa., 282.

OXWELD ACETYLENE CO. v. HASTINGS.

Written Contract—Variation of by Inducing Parol Agreement—Stipulation Against Variation—Failure of Party to Read Contract.

In an action on a contract, which stipulates that it covers all agreements between the parties and that no agent or representative of the plaintiff had made any statements or agreements modifying or adding to the terms and conditions set forth in it, the defendant cannot allege in his affidavit as a defense, that he was induced to sign the contract by a parol representation made by the plaintiff's agent which was false and which he did not allege to have been omitted from the written contract by fraud or mistake.

In an action on a written contract to sell but not to install, an acetylene plant, stipulating that it can not be altered or modified in any manner except in writing with plaintiff's duly authorized manager or officer, the defendant can not allege in his affidavit as a defense, that the plumber sent by the plaintiff to install the plant had carried away essential parts which now prevented its erection.

Even if the plumber's action were authorized, which is not alleged, it would only reduce the claim to the extent of the value of the parts removed, and this is not set forth.

It is no defense to a contract to allege that it was signed without knowledge of its contents where the party does not allege fraud or that he could not read.

Rule for judgment for want of a sufficient affidavit of defense. Common Pleas of Lancaster County, September Term, 1917, No. 20.

Coyle & Keiler, for Rule.
B. F. Davis, Contra.

January 5, 1918. Opinion by Hasler, J. The plaintiff seeks to recover the sum of \$219.50, with interest, on a written contract, a copy of which is attached to his statement. This contract provides for the sale and delivery of an Acetylene Generator, with certain appliances and attachments necessary for its use, all of which are fully set forth in it. The contract contains the following: "This order shall become a contract between the purchaser and the company upon acceptance thereof, at any of its regular offices, in the space below, by a duly authorized manager or officer of said company; it being under-

stood that this instrument, upon such acceptance, covers all of the agreements between the purchaser and the company, and that no agent or representative of the company has made any statements or agreements, verbal or written, modifying or adding to the terms and conditions herein set forth. It is further understood that upon the acceptance of this order the contract so made cannot be cancelled or repudiated by the purchaser, or altered or modified either by any agent or representative of the company or in any manner except by agreement in writing between the purchaser and the company acting by a duly authorized manager or officer of said company." It was accepted by the defendant company December 7, 1915, by Henry J. Edwards, Manager.

In his affidavit of defense, the defendant does not deny the execution of the contract by himself or the correctness of the copy attached to the plaintiff's statement, nor does he deny the receipt of all the articles mentioned in it. He attempts to avoid liability under it for two reasons, the first of which is because the parol representation was made by the agent who made the sale which induced him to sign the contract, and that this representation was false.

It was well settled that where parties reduce their contract to writing it shall not be altered by any contemporaneous parol agreement unless such agreement was omitted from it by fraud, accident or mistake, or unless such parol agreement was what induced the complaining party to sign the contract, and it has not been lived up to by the party making it. A contemporaneous parol agreement, however, cannot be admitted to invalidate, vary, or alter a written contract when it is stipulated in the contract that it covers all agreements between the parties, and that no agreement or representation has been made, either verbal or written, modifying or adding to the terms and conditions set forth in it.

In *Tranter Mfg. Co. v. Blaney*, 61 Sup. Ct. 379, the contract contained a clause, very similar to the one involved here, but at the trial the defendant attempted to prove a contemporaneous parol agreement, made with the plaintiff's agent, which was the inducing cause of his signing the contract. The Superior Court held that this could not be done. In delivering the opinion of the Court

Judge Trexler says: "Notwithstanding these cases, parties to a contract can make an agreement which embodies all the details of the subjects of which they treat. Such parties may still safeguard themselves from any future trouble by providing against the contingency of disputes arising by reason of alleged verbal engagements and by putting the entire contract in writing and by stipulating that the writing shall embrace all the contract. This is just what was done in this matter. The defendant, who could read, signed a contract in which as above set forth, there was an express provision that the contract embodied the entire agreement between the parties and that any verbal modifications were abrogated. The defendant is presumed to have known what he was doing." In *Philadelphia & Gulf S. S. Co. v. Pechin*, 61 Sup. Ct. 401, Judge Rice said: "Where a written contract provides that 'this agreement cannot be altered, changed or modified in any manner whatsoever by any agent,' a party to the contract cannot defend against his liability under it, upon the ground of a broken oral agreement made with the agent of the other party, at and before the signing of the written contract. "The written contract of subscription containing the provision above quoted, constituted the contract between the parties to this suit, and where defendant had notice that his agreement could not be changed in any manner whatsoever by any agent, under the authorities cited, he cannot now defend upon the ground of a broken oral agreement made with such agent at and before the signing of the written contract."

In *Ridgway Dynamo, etc., Co. v. Pennsylvania Cement Co.*, 221 Pa. 160, the defendant attempted to prove a contemporaneous parol agreement to modify a written contract, which contained a clause similar to the one involved in the case at bar. Justice Potter, in delivering the opinion of the Court said, "Furthermore, the written agreement contained an express stipulation that 'all previous communications between said parties, either verbal or written, contrary to the provisions hereof, are hereby withdrawn and annulled; and that no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing.' Under this stipulation, inserted evidently for the very purpose of preventing the introduction of

any such claim as that presented by the defendant, there was no room for the admission of evidence as to any other terms than those expressed in the written contract."

From these authorities it is clear that the defendant in this case, having stated in the written contract, over his own signature, that it covered all the agreements between him and the plaintiff company, and that no agent or representative of the plaintiff company had made any statements or agreements modifying or adding to the terms and conditions set forth in it, cannot avoid or change his liability under it by alleging or providing that any such statements or agreements were made by the agent even though he was thus induced to sign it. This part of the affidavit of defense is therefore not sufficient to prevent judgment.

The second reason given in the affidavit of defense why the plaintiff should not recover is as follows: "The defendant admits that he received all the articles called for in the contract, but alleges that Ross A. Craven, a plumber selected and sent by the plaintiff in January, 1916, for the purpose of installing the plant and who, it is alleged, represented and acted for the plaintiff, took away all the piping and everything that belonged to the erection of the plant so that it can not now be erected."

In his written contract the defendant agreed that he could not cancel or repudiate the contract, nor could it be altered nor modified, by any agent or representative of the company in any manner, except by agreement in writing with the company, "acting by a duly authorized manager or officer of said company."

The contract sued on did not require the plaintiff company to instal the plant, as it was simply an agreement to sell and deliver it to the defendant. It was not necessary for it, under the terms of its contract, therefore, to send a plumber to defendant's premises for that purpose. We must however, accept the allegation of the affidavit of defense as true that the plumber did represent the company. The defendant knew by the terms of his contract that he could not cancel or repudiate it, or even permit the plumber to alter or modify it by taking away any part of the articles sold or delivered to him by the plaintiff, as this would have been contrary to his written

agreement. The plumber is not alleged to have been an authorized manager or officer of the company, nor was there anything put in writing between him and the defendant. It is not even alleged that the plumber as agent for the company had any authority to take away any of the articles sold, but only to instal the plant. Under the authority of the cases cited above, the defendant could not thus modify or cancel the contract.

Even though we concede that the plumber was authorized to take away the articles, it is alleged he did take away, it is not a cancellation or repudiation of the contract, but would only entitle the defendant to a reduction of the amount claimed by the plaintiff, to the extent of the value of the parts, thus taken away. The articles taken, the circumstances under which they were taken and their value, are not set forth with such certainty as is required to enable the defendant to obtain a reduction from the amount claimed. In this respect the affidavit is vague, indefinite, and uncertain. *Worth Bros. v. Henry Martin Brick Machine Co.*, 24 L. L. R. 286.

The defendant alleges that he has no knowledge of what is set forth in the contract. This is not material and not a defense. He does not allege that he cannot read, or that he was imposed upon as to what the contract contained when he signed it. The case of *Colt Co. v. Dffenbaugh*, 60 Sup. 192, relied upon by the defendant has no application to the questions involved here for the reason that the defendant does not allege that the statements of the agent were omitted from the written contract through fraud. In that case the agent represented that the promises he made were contained in the written contract, part of which he read, so that the defendant was fraudulently led to believe, as the agent intended he should be, that they were part of it. In the case at bar, no representations were made that the statements made by the agent were contained in the written contract nor is it alleged that the defendant was led to believe that they were there. In fact over his own signature he stated that the written contract contained all the agreements between himself and the company, and that no verbal or written statement or agreements had been made by the company modifying or adding to the conditions contained in it.

The affidavit of defense in our opinion is insufficient to prevent judgment, and we, therefore, make absolute the rule for judgment for want of a sufficient affidavit of defense, and enter judgment for the plaintiff for \$233.22.

HUGHES v. MURPHY.

Chattels — Contract — Bailment or Conditional Sale — New Parts Added to Bailed Chattel — Execution — Judgment Non Obstante Verdicto.

Where one obtains possession of a chattel upon a written contract in which he declares that he has rented the chattel, that he is to pay a certain amount in instalments, as rental and when paid the article shall become his property, but until the rental is paid no title is to be acquired by or vested in him, the contract is one of bailment and not a conditional sale. The absence of an express covenant to return a chattel at the end of the term does not turn a bailment into a conditional sale.

Where the bailee of a chattel replace a part of it, such new part does not become the property of the bailor and may be sold upon execution against the bailee.

There can be no judgment excepting one on the verdict, unless a point for binding instructions, is refused or reserved.

Where an execution creditor levies upon a bailed chattel and disputes the title of the bailor, he cannot upon interpleader recover upon a contingent interest of the bailee.

Motion by defendant for judgment non obstante verdicto in No. 377 December Term, 1915.

E. A. Howell, for Motion.
J. Borton Weeks, Contra.

December 31, 1917. The Court: This was a sheriff's interpleader issue to try the title of an automobile which the defendants had levied on as the property of Joseph A. Senior, on April 4, 1916, in his possession, and which was claimed by the plaintiff to belong to him. On the trial it was admitted that the automobile belonged to the plaintiff unless title to it passed to Senior by virtue of a transaction between the plaintiff and Senior, which was evidenced by a writing, signed by Senior, of which the following is a copy:

"This is to certify that I, Mr. Joseph Senior, have received and rented of Thomas Hughes, the article or articles described in the annexed schedule, valued at \$515, for the use of the said article or articles, and as rent for

the same have this day paid to the said Thomas Hughes the sum of \$250 as deposit, and promise further to pay to his collector or authorized agent the sum of \$265.00, with note as collateral, payable \$40.00 monthly with interest until the above-named amount is paid, at which time said rent shall cease, and said article become my property.

"The above-named article or articles to remain the property of Thomas Hughes and no title thereto to be acquired by or vested in me until this obligation is fully complied with on my part, and in event of failure to meet promptly any of said payments, I agree on demand, to surrender said article or articles to Thomas Hughes without process of law, and said T. Hughes is authorized to enter my premises by his agent or agents to remove the same, and to retain the sums already paid as rent or hire for the use of said article or articles while in my possession. And I also agree not to remove said article or articles from the premises I now occupy, or part with the possession thereof, without first obtaining the written consent of Thos. Hughes."

The rights of the parties depended upon the construction of this writing. Hence it was necessary for the court to construe it, and we did construe it as a bailment for hire and not a conditional sale. We see no error in this; *Reading Automobile Co. v. DeHaven*, 53 Pa. Super. Ct., 344. The absence of an express covenant to return the property at the end of the term does not turn a bailment into a conditional sale; *Id.*

At this stage of the case the plaintiff was entitled to a verdict but it appeared that the top of the automobile was not the top which was on it at the time of the bailment, but was subsequently attached to it by the bailee. There was no dispute as to this. Evidence was introduced as to the value of this top which belonged to the bailee, and the jury was instructed to render a verdict for the defendant and to determine the value of the top, which was accordingly done and the value of the top was fixed at thirty-five dollars.

The defendants now move for a general judgment in their favor. There can be no judgment entered, except a judgment on the verdict, except that where a party presents a point for binding instructions, which is refused or reserved, he may move for judgment on the whole

record: Act of April 22, 1905, P. L. 286, Stewart's Purdon, Vol. 6, page 7139, pl. 35. But even if this had been done the defendants could not have more than they have now, a verdict in their favor, upon which they can enter judgment. Their real complaint is that the jury was not instructed, to include in their valuation of property, the value of Senior's interest in the automobile. The remedy for this would be a motion for a new trial. But even if such motion had been made it would not avail them, because there was no issue as to Senior's interest in the automobile. The defendants did not levy on Senior's interest in the automobile. They would have had a right to do so; Meyers v. Prentzell, 33 Pa. 482. They levied on the automobile. The plaintiff claimed title to it. Then the defendants had another opportunity to assert their right to proceed to sell Senior's interest in it. If they had done so, the interpleader would have been quashed, because a sale of Senior's interest could not affect the plaintiff; Logan v. Gest, 6 Del. Co. Reps., 242. And the defendants could have proceeded to sell Senior's interest. Even this would have passed nothing, after the bailee was in default; Cobb Chase v. Deiches, 7 Pa. Supr. Ct., 252. Instead of pursuing their right to sell Senior's interest in the automobile they took issue with plaintiff's claim of ownership, by categorically denying it, and this was the only issue presented at the trial and this issue has been properly decided. We, therefore, refuse defendant's contention and direct judgment to be entered on the verdict.

Opinion by Broomall, J.

ASSIGNED ESTATE OF LEVI ALDERFER.

Purchase Money Mortgage—Mortgage as Collateral Security for Note for Purchase Money—Act of March 28, 1820, 7 Sm. Laws, 303.

A mortgage given by a vendee as collateral security to the endorser on his note for money to be used as purchase money discounted several days before, pursuant to his agreement to give his endorser a purchase money mortgage is nevertheless not a purchase money mortgage, and, when recorded within six months, will not prorate on distribution, with a judgment entered the day before by parties having no knowledge of such agreement.

The burden is on a mortgagee to show that the mortgage was given for purchase money, where this does not appear on the face of the mortgage.

While a purchase money mortgage may be given to a third person who furnishes the money, the delivering of the deed and mortgage must be concurrent and simultaneous acts and the money actually be paid over for the property at the same time.

Exceptions to report of auditor. Common Pleas of Lancaster County, Trust Book No. 24, Page 1.

Amos Burkholder and John E. Malone, for Estate.

John A. Nauman, for Exceptions.

Harnish & Harnish, Contra.

January 5, 1918. Opinion by Hassler, J. The exceptions to the learned auditor's report, question the correctness of the auditor's finding that the mortgage on the real estate of the assignor, the sale of which produced part of the fund for distribution, is a purchase money mortgage and entitled, as such, to share pro rata with a judgment entered the day before the mortgage was recorded.

The learned auditor found the following facts: "I find that Alderfer purchased the Churchtown hotel property from Susan A. Hoffert et vir on March 22, 1909, the deed being recorded the same date. * * * In order to obtain the money for the purchase of this property, Alderfer, several days before the transaction took place had a note for \$1500 on which Frank J. Rieker and George Grove were endorsers discounted at the New Holland Bank, agreeing to give them a judgment note as collateral security when he acquired title to the property. About the same time and for the same purpose, he had another note for \$1500, on which George B. Kafroth was endorser, discounted at the Blue Ball Bank, agreeing to give him a mortgage when he acquired title to the property. On the same day that the deed was executed, Alderfer executed a judgment note to Rieker and Grove as collateral security for their endorsements and executed a mortgage to Kafroth as collateral security for his endorsement. The testimony does not show the exact time of the execution of the judgment and mortgage. While the notes, for which these liens were given as security, were discounted several days before the collateral was

given, it is an undisputed fact that Alderfer used the money obtained on these notes in the purchase of the property and that the mortgage and judgment were given as collateral security for these notes. The Rieker and Grove note was entered for record the same day that it was given and the Kafroth mortgage entered up the following day. It is now contended on the one hand that by reason of the entry of the judgment a day previous to the mortgage that the judgment has a superior lien on the funds realized from the sale of the premises, and on the other hand that the mortgage was a purchase money mortgage, the lien of which it having been recorded within the sixty days, reverts back to the time it was given and is therefore entitled to participate in the funds." The testimony also showed that the assignor agreed, at the time the note was endorsed by Kafroth, to to give him a purchase money mortgage and that the exceptants had no knowledge of that agreement.

He then concludes, on the authority of the Commonwealth Title Insurance and Trust Co. v. Ellis, 192 Pa. 321, that both the mortgage and judgment were liens, and that the mortgage was a purchase money mortgage, and, according to the Act of Assembly, could be entered within sixty days of its execution with the same effect as if entered at the time of its execution. He then distributes the fund between the holder of the mortgage and the holder of the judgment pro rata. To this report the plaintiffs in the judgment have excepted, claiming that as a first lien creditor they were entitled to have the whole fund for distribution, arising from the real estate, awarded to them on their judgment.

The Act of March 28, 1820, Sec. 1, 7 Smith Laws 303, fixes the lien of a mortgage at the date of recording, except in the case of purchase money mortgages, which are excepted from this rule in the following language: "Provided that no mortgage given for the purchase money of the land so mortgaged shall be affected by the passing of this Act, if the same be recorded within sixty days of the execution thereof."

It will be observed that the right to enter a mortgage within sixty days of its execution, and have its lien date from the time of its execution, is only for such mortgages as are "given for the purchase money of the land." The

mortgage given to Kafroth was not for the purchase money of the land conveyed to the mortgagor on the day it was given. Kafroth furnished no money for that purpose. He only assumed a liability by endorsement of a note, by means of which the mortgagor obtained money from the bank, and the mortgage was given to protect him from any loss by reason of that liability. If Alderfer, who was primarily liable on the note had paid it, then Kafroth would not have paid anything, and we would have had the land bound, according to the auditor's finding, by a purchase money mortgage, given to a man who never paid any money that was used to pay for it, or to replace money which Alderfer had borrowed for that purpose. Certainly such is not the purpose of the act of assembly. In order to permit a mortgage, given for the same purpose as this one was, to be entered within sixty days of the date of its execution, and have its lien date back to that time, it would be necessary for the act to state not only that mortgages given for purchase money, but also that mortgages given as collateral security, for the purpose of assisting the mortgagor to raise the purchase money, shall be entitled to that privilege. This it does not do, and consequently the act does not include such mortgages, as the one in question here, among those having that privilege.

The learned auditor says that the fact that the mortgage was given as collateral security for the note does not alter the situation, as all mortgages are given as collateral security, the bonds accompanying them being evidence of the debt, and the mortgage being collateral security for it. It is unnecessary for us to discuss this, as here neither a note nor a bond nor the mortgage was given for the purchase money of the land. The burden of proof was on Kafroth to show that he gave Alderfer money for the purchase of the property, and that it was so used. This he did not do, but only proved that it was given to secure him for his endorsement of the mortgagor's note, upon which he, the mortgagor, raised part of the money, which he used to pay for the real estate. The substance, not the form of the arrangement, is what gives a mortgage the privilege of being entered within sixty days. As we have said this burden was on Kafroth, because it does not appear on the face of the mortgage

that it was for purchase money, but even though it had so appeared, it would not have been conclusive, but the whole transaction could have been shown, and it thus would have been ascertained whether it was entitled to the privilege contained in the act of assembly: *Albright v. Lafayette Building and Loan Association*, 102 Pa. 411.

But if we concede that Kafroth, in endorsing the Alderfer note, furnished money at that time, and that it was used to pay for the land, it was not furnishing a part of the purchase money within the meaning of the act, and consequently a mortgage given for its security would not be entitled to the privilege claimed.

In *Land Title Insurance and Trust Co. v. Ellis*, 192 Pa. 321, it is decided that where the delivery of a deed to the mortgagor and of the mortgage to the mortgagee are concurrent and simultaneous acts, and the money, for which the mortgage was given, is actually used as part of the purchase price paid for the property, it is within the protection of the act of assembly and its lien dates back to the time of execution if recorded within sixty days. It is also decided that it need not appear in the mortgage that it was given for purchase money, nor is it necessary that the mortgagee pay the money to the grantor named in the deed. The same principle is declared in *Cohen's Appeal*, 10 W. N. 544, where the vendee, with the consent of the vendor, contracted with a bank to pay part of the money which he had agreed to pay for land and which the bank actually paid at the time of the execution of the deed, it was held to be a purchase money mortgage within the protection of the statute. In both of these cases the only reason urged why the mortgages should not have been considered purchase money mortgages was that they were not given to the grantors in the deeds. All they decide therefore, is that, under the circumstances arising in each case, a purchase money mortgage can be given directly to a third person who actually furnishes or pays any of the purchase money.

In *Albright v. Lafayette Building and Loan Association*, 102 Pa. 411, Justice Green recognizes the law as declared in *Cohen's Appeal*, but says, "On the contrary, however, money borrowed by the vendee to pay for land, becomes the money of the borrower, and he may apply it as he pleases; it follows, that a mortgage given to secure

its repayment would not be a purchase money mortgage, whether the money was so used, or used for any other purpose." The difficulty and injustice of considering such a mortgage a purchase money mortgage as against a third party, whose rights, as in this case, have intervened prior to the date of recording the mortgage, is pointed out in that case.

In this case Kafroth, the mortgagee did not pay part of the purchase money. If his endorsement of the note several days before the purchase money was paid, can be considered as furnishing money, it was nothing more than a loan to Alderfer, and an agreement to give a mortgage to secure its repayment, which should have the privileges of purchase money mortgages would not be valid as against the exceptants whose judgment was made a lien, before the mortgage was recorded, and who had no knowledge of notice of any such agreement.

We are of the opinion that the learned auditor erred in holding that Kafroth's mortgage was a purchase money mortgage, the lien of which on the real estate, from the sale of which the fund for distribution was realized, dated back to the time of its execution, and in awarding a pro rata share of that fund to it. It should all have been awarded to the exceptants on their judgment, which was a prior lien. We therefore sustain the exceptions and recommit the report to the learned auditor to make distribution in accordance with this opinion.

Exceptions sustained.

ESTATE OF MARY EGAN.

Issue Devisavit Vel Non—Question of Fact—Jury Trial.

The legal sufficiency of a writing alleged to be a will constitutes a question of fact which is sufficient to award an issue to be determined by jury.

Petition for Issue, Orphans' Court of Schuylkill County.

J. F. Whalen, O. E. Farquhar and D. J. Ferguson for Will.

M. M. Burke, Contra.

Wilhelm, P. J., Jan. 21, 1918. Mary Egan died on the 29th day of May, 1916. Letters of administration were issued upon the application of Thomas C. Egan, her son, on the 5th day of June, 1916, by the Register of Wills.

On the 14th day of June, 1916, Thomas C. Egan presented to the register a paper purporting to be the last will and testament of Mary Egan, and asked that the letters of administration issued to him be revoked. The letters of administration were revoked, and the alleged will of Mary Egan probated by the register, and letters testamentary issued to Thomas C. Egan.

The witnesses to the will were Kathryn and Mary V. Durkin.

Subsequently an appeal was taken from the action of the register in admitting to probate the paper as the last will and testament of Mary Egan. Testimony was taken in support and against the appeal, and it appears that Mary V. Durkin now alleges that her affidavit before the register as to the execution of the will by Mary Egan was untrue. She now asserts that Mary Egan did not execute the will in her presence; that her signature as a witness to the will was written on the paper some days after Mary Egan was buried; that the first time she saw the paper was the day upon which she attached her signature thereto. She says that she signed the will as a witness at the request of Kathryn Gallagher, the other witness, and that a short time after the will was probated, she had two talks with Kathryn Gallagher in which she expressed her desire to undo the wrong she had committed in signing the paper and in securing the probate.

Kathryn Gallagher testifies that the will was written by her at the request of her mother; the mother dictating the will and the witness writing as the mother dictated, and that the language in the will as set down were the words of her mother as dictated. The will was written between eleven and twelve o'clock on the night of May 20, 1916; that the only persons present were Kathryn Gallagher, Mary V. Durkin and the testatrix, that the mother was suffering from a serious illness, and that the testatrix took the pen in her hand, and unaided made the mark to her will and the will was then and there signed by the witnesses.

Mary Egan was about sixty years of age at the time

the will is alleged to have been executed. The day following the execution of the paper she was taken to a hospital and an operation performed upon her, and her death followed in about a week.

The estate of Mary Egan amounts to about nine or ten thousand dollars. Thomas C. Egan is the chief beneficiary in the will, which is as follows:

Shenandoah, May 29-1916.

MARY EGAN'S LAST WILL.

I Mary Egan being of sound mind give and devise and bequeath to my son Thomas C. Egan all my stocks, bonds, notes, mortgages and other papers of indebtedness together with my household furniture and my interests in any thing whatever with the understanding that my son Thomas C. Egan will provide a home for my daughter Kathryn Gallagher should she not enter into marriage. Thomas C. Egan my son, will pay to my daughter, Mary V. Durkin, after my decease the sum of Five Hundred Dollars. To my daughter Annie McHale, wife of Richard A. McHale will be given three Hundred Dollars provided in the will of my beloved husband.

her
Mary X Egan
mark

Witnesses:

Mary Gallagher,
Mary V. Durkin."

On the night of the alleged execution of the will, Thomas C. Egan, a student at Georgetown College, returned to Shenandoah, and was in the home of Mary Egan, and in bed at the time the will is said to have been executed. Thomas C. Egan, the principal beneficiary, alleges that he did not know that his mother had executed a will until after he had secured letters of administration upon her estate, and that the first knowledge of the will which he had was after his return from Pottsville in the evening of the day letters of administration were issued to him, when he was informed by Kathryn Gallagher that his mother had made a will and was directed to the place containing the will.

If Mary V. Durkin was not corroborated in her story, it is possible that it would be the duty of the court to refuse to grant an issue because it might be a dangerous

practice to strike down a will when a subscribing witness attempts to nullify it by declaring that her testimony before the register was untrue. But in this case the self-discredited witness is corroborated by the testimony of other witnesses, one of whom, Annie McHale, states that she was in the home and room of her mother at the time that Kathryn Gallagher says the will was dictated, reduced to writing and executed; and who positively states that Mary Egan, her mother, did not make a will during this night.

The testimony of Annie McHale is corroborated by her husband, Richard A. McHale, who says that Annie McHale was at the house of Mary Egan at the time she describes and that he called at the house of Mary Egan at twelve o'clock for the purpose of accompanying his wife to their home.

William J. Durkin, another witness, says he was at the house of Mary Egan on this night, having called there about eleven o'clock, and remained there about fifteen minutes and he saw Annie McHale in the room of Mary Egan during the time of his call.

Mary V. Durkin is further corroborated by the appearance of the will itself. An examination of the paper may well raise a doubt as to whether the name of Mary V. Durkin was appended to the will at the time it was written, because the name of Mary V. Durkin appears to have been written with a different kind of ink from that used in the body of the will, the name of Mary Egan appended thereto, and the name of Kathryn Gallagher, the other witness.

This peculiarity in the will as well as the fact that the existence of the will was not known by Thomas C. Egan for sixteen days after its alleged execution, although he was an inmate of the house of Mary Egan during all of the time between its execution and production of the will, are facts which bear upon the credibility of Kathryn Gallagher, notwithstanding her explanation of this circumstance.

It is unnecessary to discuss all of the testimony, because we think we have pointed out sufficient testimony which justifies us in submitting this case to a jury. And if a jury should find a verdict against the will, the court

would not feel constrained, under the testimony, to set aside that verdict.

The contestant's evidence alone seems to make this a case for a jury. The proponent's evidence does not meet, answer and overthrow the contestant's case so as to leave a one-sided issue.

Considering the whole evidence, we cannot say that a jury would not be justified in finding a verdict against the will. There are questions of fact here to be decided, and that is clearly within the province of a jury, therefore, an issue should be awarded.

The legal sufficiency of the writing is in dispute, and the testimony against the execution of the will is sufficient to carry it to the proper tribunal, and the function lies in the hands of a jury.

And now January 21, 1918, an issue devisavit vel non is granted, and counsel is ordered to prepare a paper in the nature of a precept for an issue to the Court of Common Pleas for trial of the fact whether or not the paper probated as the last will and testament of Mary Egan was executed by the said Mary Egan.

ARMSTRONG v. CONESTOGA TRACTION CO.

Trolley Cars—Collision on City Streets with Wagon—Rights and Duties of Driver and Motorman—Negligence.

In an action to recover damages for injury caused by the plaintiff's wagon being struck by a trolley car of the defendant company while driving in daylight across its track on a public street, he testified that he looked and listened but only saw the car when he was on the track and it was 120 feet away and it sounded no warning and that he could see the track for 400 feet, and the car was running twelve to fifteen miles an hour. The defendant claimed that the plaintiff was guilty of contributory negligence in not getting off the track faster or in driving on the track at all, in front of the car. On verdict for the plaintiff and motion for judgment for defendant, n. o. v.,

Held, that the verdict should be sustained that it was not error to refuse to give binding instructions, and that the motorman could also have seen the defendant for 400 feet and it was his duty to control his car, and give the plaintiff sufficient time to pass over the track. Whether or not he did so and whether or not the accident was attributable to his faults were questions for the jury.

A driver is not negligent as a matter of law in driving across a track in a city street in front of a car a sufficient distance away to allow him to get across if run at the usual rate of speed.

Rule for judgment for defendant non obstante verdicto. Court of Common Pleas of Lancaster County. February Term, 1917, No. 36.

S. R. Zimmerman and John E. Malone, for Rule.
B. F. Davis, Contra.

March 23, 1918. Opinion by Landis, P. J.

It is not claimed by the defendant that the facts and the law were not properly stated in the charge to the jury; but it is contended that the plaintiff's case showed within it contributory negligence, and that, therefore, binding instructions should have been given to the jury. Consequently, if the plaintiff's evidence disclosed sufficient grounds upon which to base a recovery, the verdict must necessarily stand.

The plaintiff was engaged in selling and delivering milk. About nine o'clock on the morning of September 28, 1916, when he was returning from his milk route, the accident occurred. He lived on the east side of South Queen street, in the City of Lancaster. The defendant's track is laid and its cars run north and south upon that street. The plaintiff was driving in a wagon of his own, but with a hired horse, along the west side of the street, going south, and he was outside of the rails. When he got to Hager street, he, in order to go to his stable, which was at the rear end of his lot, crossed the railway track, towards East Hager street, and, when his horse had gotten across, a car, coming from the south, struck the wagon about the centre, with force, and dragged it thirty or forty feet. The plaintiff testified that, before he attempted to cross the track, he looked to see if any car was coming, and also listened; that he could hear nothing, and that no bell was rung nor was any other signal given; that he kept looking until he got on to the track, and that only then he saw the car about 120 feet away. He testified that the horse was walking across the track; that the car was running at the rate of about from twelve to fifteen miles an hour; and that he could see to the bend of the street, which was about 400 feet south of the place of the accident. These are substantially the facts as they were presented.

The Court affirmed a point to the effect "that the

driver of a team, who, at the intersection of two city streets, fails to look immediately before going upon the track, is guilty of contributory negligence," and also charged as follows: "It is the duty of motormen on street railway cars to be constantly on the alert and to keep a sharp lookout ahead. When it is necessary to give warning, they must also sound a whistle or a bell. They must also, at crossings at least, have their cars under control, and they are not permitted, in a city, to run at an excessive or dangerous rate of speed. If they violate these rules they are guilty of negligence, and if an accident ensues their principal is liable to the extent of the injury. A person about to cross a street at a regular crossing is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross, if it is run at the usual rate of speed, it cannot be said, as a matter of law, that he is negligent in going on. The rule to stop, look and listen, applicable to the crossing of steam roads, applies only in part to the crossing of street railways. There is always a duty on one to look for an approaching car, and, if the street is obstructed, to listen, and, in some situations, to stop, and the plaintiff must be held to have seen what was obvious. To attempt to cross the tracks of a steam railroad in front of an approaching train is generally such negligence as will prevent a recovery. The intervals, in such cases, between the running of trains, offer sufficient opportunity to cross, and there can be no accurate calculation of the speed of an approaching train on a steam railroad. But, in the use of the streets of a city, where cars are constantly passing, crossings must of necessity be made in front of approaching cars, and, as they run at a nearly uniform rate of speed, it is not difficult to determine whether or not it is prudent to cross. This rule applies only to city streets and at regular crossings, and does not relieve those about to cross at regular crossings from the exercise of a high degree of care. . . . Therefore, if the plaintiff was not looking, or if he, when the car was close by, calculated the chances and made a mistake in not getting across, then he is chargeable with contributory negligence and cannot recover, because, under such circumstances, the accident was caused by his own fault . . . The law relative to the rights and duties of those who use

the streets,—the public, of course, have the right to use the streets and so have the street railways,—is that they must both exercise due care according to the particular circumstances.” Was it proper, therefore, to submit the case under these instructions?

A multitude of cases in the Appellate Courts seem to me to lay down the rule applicable in such a situation. In *Rote v. Pennsylvania & Mahoning Valley Railway Co.*, 34 Sup. 508, Head, J., has well stated the proposition. There, the plaintiff was driving a wagon on a dark and foggy night on one of the defendant's double tracks on which he would face an approaching car. At the moment the plaintiff went upon the track in question, he checked the speed of his horse and looked and listened for an approaching car, but could see or hear nothing. Immediately afterwards, a car appeared ahead of him, with a signal light shining, but no gong sounding. He attempted to leave the track, but his wagon was caught and he was injured. He testified that the car was going between twelve and twenty miles an hour. It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained. The learned judge, in delivering the opinion, said: “Although the plaintiff with his buggy and the defendant with its car were both using the same portion of the highway at the same time, each was in the exercise of a lawful right. Conceding that the right of the defendant to the use of the track was paramount, it was none the less bound to enjoy that right in such manner as to afford other traffic, when warned of the approach of a car, a reasonable opportunity to clear the track. Because the night was dark and foggy, the law did not require the plaintiff to remain at home nor oblige the defendant to stop running its cars. It did impose on both the duty of proceeding with more than ordinary care. The plaintiff must have been alert and actively using his senses of sight and hearing to discover the approach of the car. There was nothing in his testimony to warrant the Court in declaring that he had failed in the discharge of that duty. . . . The law does not attempt to fix with precision the speed at which a car may travel or when or how often its gong should be rung under all conditions of weather, traffic, etc. It can only say, as it has so often said, that the standard of legal duty in all conditions is

due or reasonable care under the circumstances. The whole question, therefore, of the defendant's care or negligence, in the present case, was a mixed one of law and fact, to be solved only by the verdict of a jury under proper instructions from the trial judge."

In *Friedland v. Altoona and Logan Valley Electric Railway Co.*, 59 Sup. 539, the plaintiff sustained injuries in a rear-end collision between an electric car and the buggy in which he was driving. There was evidence that the car was going very fast on a down grade on a clear day, at about nine o'clock in the morning; that the plaintiff was in plain view, driving in the direction in which the car was moving; that there were vehicles on each side of the street which obstructed the plaintiff's way in getting off the track; that the collision was violent; and that the car ran from 80 to 125 feet after the buggy was struck. Henderson, J., in delivering the opinion of the Court, said: "On such a state of facts, the Court could not have held, as a matter of law, that the motorman exercised due care under the circumstances. The plaintiff was in the exercise of a lawful right in driving along the track, and although the defendant company was entitled to the right of way, its employees were bound to exercise the right in such a manner as to give those driving along the track a reasonable opportunity to get out of the way when notified of the approach of a car."

In *Harper et al. v. Philadelphia Rapid Transit Co.*, 258 Pa. 282, it appeared that injuries were sustained by the driver of a wagon while in the act of driving off defendant's tracks. A long ladder protruded over the end of the wagon, and the driver, upon being apprised that a car was approaching, endeavored to drive off the tracks. The motorman of the car had a view of the plaintiff for 300 feet; but drove up, struck the ladder after the wagon itself had cleared the track, pushed the horse and wagon 150 feet from the point of collision, and threw the plaintiff to the ground. Mr. Justice Walling, in delivering the opinion of the Court, said: "An inference of defendant's negligence can reasonably be drawn from the evidence, and, therefore, the case is for the jury. . . . While the street railway company has the right of way, it must give the driver of a vehicle an opportunity to clear the track. See *Heuber v. Consolidated Traction*

Company, 210 Pa. 70; Trumbower v. Lehigh Valley Transit Co., 235 Pa. 397. A case quite like the present is that of Davidson v. Schuylkill Traction Co., 4 Pa. Superior Ct. 86, where the earlier authorities are cited and considered by President Judge Rice. It was said by Mr. Justice Potter, in the recent case of Gordon v. Beaver Valley Traction Co., 247 Pa. 248, 249: 'As we have often held in similar cases, it was the right of the plaintiff to drive on any part of the street, subject to the superior right of the defendant to the use of its tracks, and warning of the approach of the car should have been given to plaintiff, and he should have been allowed sufficient time to get off the track in safety. Whether or not such warning was given, or sufficient time was allowed him to get out of the way, or whether the car actually struck the wagon and caused the injuries to plaintiff for which he sought to recover, were all questions of fact for the jury.' "

In Davis v. Media, Middletown, Aston and Chester Electric Railway Co., 25 Sup. 444, the language of Porter, J., is: "When the tracks are laid in a public highway, the driver of a wagon lawfully using them in front of an approaching car, while it is his duty to give way and not obstruct its progress, is entitled to reasonable warning and reasonable time to get out of the way. The employees of the defendant company were bound to keep the car under control and had no right to run the plaintiff down either upon the track or while he was in the act of leaving it. They were bound to use every reasonable effort to avoid a collision."

If, then, the plaintiff could see the car for a distance of 400 feet from the place of the accident, the motorman was equally able to see the plaintiff. It was his duty to control his car and to give the plaintiff sufficient time to pass over the track. Whether or not he did so and whether or not the accident was attributable to his fault were questions of fact for the jury, and, on submission, they were determined in favor of the plaintiff. I can see no error in the refusal of the point for binding instructions. I cannot understand how, under any circumstances, binding instructions could have been, under the facts, directed for the defendant. The rule for judgment non obstante veredicto is, therefore, discharged.

Rule discharged.

WILSON v. PHILADELPHIA RAPID TRANSIT CO.

Plaintiff backed his automobile out of the driveway across defendant's tracks to run northward on the east side of the street. A trolley car moving in the same direction collided with plaintiff's automobile.

At the trial the motorman's and conductor's statements which were made at the time of the accident were admitted. The admission of these statements are the only grounds upon which judgment for defendant non obstante veredicto is asked. Held, that since these statements were made immediately after the occurrence of the accident, they are properly admissible, and therefore, the defendant's motion for judgment non obstante veredicto must be overruled.

In the Court of Common Pleas of Montgomery County. No. 34, June Term, 1915.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Swartz, P. J., October 22, 1917. The plaintiff's car was standing in the driveway leading into Wenner's Coal Yard from Cresmont avenue. He was accompanied by Mr. Romig, his father-in-law. Cresmont avenue is forty-four feet wide from curb line to curb line, and two tracks of the defendant trolley company are located along the middle of this highway. The part of the road occupied by the trolley tracks is paved with brick. The avenue runs north and south. The roadways, on the east and west sides of the streets, are not in condition for travel with vehicles. Automobiles and carriages necessarily use the paved part of the highway occupied by the trolley tracks, or at least a part thereof. The cars run north on the east track and south on the west track. Wenner's Coal Yard is on the west side of Cresmont avenue.

The plaintiff backed his auto out of the driveway. He intended to run northward on the east side of the street. A trolley car of the defendant company was moving on the east track and was, therefore, going in the same northward direction. When the plaintiff backed his car he says he curved toward the south, so as to bring his car on the east side of the avenue facing it northward, —the direction in which he intended to drive.

There was a collision between the automobile and this trolley car that was moving northward.

The witnesses differ seriously, as to the point in the street where the accident happened and how it was brought about.

There was a slight snow on the ground, at the time.

The plaintiff testified, that he backed his auto out of the driveway, in a southerly direction, and crossed over the avenue in a diagonal course till his car stood in the middle of the east trolley track. He declared that when his car stopped he was ten or fifteen yards south of the Wenner driveway or lane, that he then reversed the motion of his car, started forward on low gear, at three miles an hour, that he had trouble in starting because his wheels slipped on the snow, that he went forward fifteen or twenty yards partly on the east trolley track, and was then struck in the rear by the trolley car. His auto was pushed to the west side of the avenue, a little to the north of the Wenner driveway entrance. He was thrown from his auto and landed on the west side of the highway. He alleges that the bones of his wrist were displaced, that his ankle was hurt, and that his abdomen was injured by the fall on the roadway. The top of his car was wrecked and the car itself was damaged.

His car when struck was driven to the west side of the avenue and stood at a right angle with the street and trolley tracks. The front of the car faced the west bank of the highway. This point was ten feet north of the driveway.

The plaintiff declares, that he looked up and down before he entered his car and that he continued to look through the rear glass of his machine and could see south as far as Hamilton street, as he backed upon the east or north bound track. Hamilton avenue is over six hundred feet south of the Wenner driveway. There is a down grade on Cresmont avenue looking southward from the Wenner Coal Yard. This down grade ends in a hollow a little south of Decatur avenue. The distance from the Wenner driveway to this hollow is about four hundred feet. From the point of this hollow there is a steep up grade to the south for a distance of more than fifteen hundred feet. The down grade south from the Wenner Coal Yard is a moderate grade, but increases as you travel northward from the Coal Yard. Cresmont avenue is straight for nearly one mile, and standing on or along

the highway, at the Coal Yard, there is an unobstructed view, to the south, for a distance of about one-half a mile.

The movements of the plaintiff's automobile, immediately before and after the collision, as described by him, were confirmed by other witnesses. Mr. Wenner traced the course of the auto in the snow. He says that there were no other tracks at the time to interfere with his observations. He testified that the auto backed southward on Cresmont avenue, about three car lengths, then started forward with some difficulty because the snow indicated the slipping of the wheels, that it moved forward to the Wenner driveway and landed on the west side of the highway, as already described.

Mr. Eason describes the accident, in accord with the plaintiff's account, but he adds, that when the automobile stopped backing it was on the north bound track and that the trolley car, at that time, was at Hamilton avenue—that is more than six hundred feet distant from the automobile. He turned around and in two seconds he heard the crash. The automobile, he says, had moved forward twenty-five feet, was running parallel with the highway, and was struck in the rear.

The motorman and conductor testified to a different state of affairs. According to their account the plaintiff backed into, or right in front of the moving trolley car. Their evidence is corroborated by witnesses who were passengers in the trolley car and by others. They also declared, that the speed was moderate and that the motorman had his car under control.

We instructed the jury, that if the accident happened as described by the defendant's witnesses the plaintiff could not recover. We went a step farther and declared, that unless the jury found that he had backed his car on the tracks, had then gone northward some distance, and was then struck by the trolley car, there could be no recovery.

We think it is self evident that if the automobile had passed out of the driveway, backed southward upon the north bound track, and was at that point when the trolley car was more than six hundred feet away, that it must then follow that the motorman did not have his car under the control that the conditions before his eyes demanded.

It required some time for the plaintiff to cross the highway. It required time to reverse his engine and to start his car forward in the slipping snow. It required additional time to go forward the distance of "fifteen or twenty yards." Especially so if the plaintiff was running but "three miles" an hour. If the trolley car traversed the six hundred feet in two seconds, or while the witness Eason turned around, it indicates reckless speed under the circumstances. Of course these expressions of the witness are extravagant, but they indicate that to his mind the plaintiff had no opportunity to make room for the on-coming trolley car. The motorman was in duty bound to give the plaintiff sufficient time to move from the trolley tracks. The employees of a street railway company are bound to keep their cars under control and have no right to run down the driver of a vehicle when on their tracks or when in the act of leaving the tracks. They are bound to use every reasonable effort to avoid a collision. The driver of a vehicle is entitled to a reasonable time to get out of the way. *Woelfel v. Railway Co.*, 183 Pa. 213 *Holt v. Penna. R. R. Co.*, 206 Pa. 356; *Davis v. Electric Railway Co.*, 25 Pa. Superior Ct. 444.

Special precautions were required by the motorman in this case because he must have known that to get out of the way meant to leave one trolley track and enter upon the other. We took a careful view of the grounds and we fail to see how a fast railway line can with safety make a common use of this highway with carriages and automobiles. The plaintiff did not make use of Cresmont avenue from choice, but he was called to the Wenner Coal Yard in pursuit of his professional business.

It is argued that the trolley car was coming up a grade for some distance, just before the collision, and that this fact gave the motorman control over his car. This would necessarily depend upon the speed and momentum of the car as it reached the foot of the long and steep hill.

The distance to the point of the collision from the bottom of the down grade and the moderate up grade would not quickly check a car beyond control at the foot of the hill.

The declarations of the employees, in charge of the trolley car, and made immediately after the accident, would justify the jury in reaching this conclusion. Mr.

Wenner says, that the conductor as he stepped off the back of his car to the ground, declared,—“I knew damn well we were going to hit that car when we were at the foot of the hill.” This statement was made right after the accident.

The plaintiff testified that he had a conversation with the motorman and conductor, immediately after the accident. Counsel for plaintiff then put the question,—“What, if anything, did they say with reference to the operation of the car?” Counsel for defendant objected. The Court then ruled “You will have to show how long or how soon after the accident it was.”

Counsel for plaintiff,—“I said immediately after the accident.” By the Court,—“Then it is competent.” Counsel for defendant,—“If it was immediately, then it was right during the accident before they moved away, or conditions had changed or anything of that sort.” By the witness,—“That is right.”

The plaintiff testified that the motorman stated,—“He was going down the hill so fast, he could not control the car.” “I put on my brakes and took them off again, and put them on again and off again, and then I made up my mind I was going to kill somebody.” There was some further cross-examination, as to the occurrences immediately after the accident, but these declarations by the conductor and motorman, according to the evidence, were voluntary statements, made immediately after the accident. This is certainly true as to the conductor who uttered his words as he stepped from his car to the ground. The plaintiff was asked whether the declarations of his employees were made after the conductor entered the office and telephoned. The answer was,—“No, it was immediately after the accident.” Mr. Wenner also says the conductor asked for a telephone station, but asserts that the above statement was made just as the conductor stepped from his car to the ground.

The words used in *Hanover Railroad Co. v. Coyle*, 55 Pa. 402, fit our case,—“The negligence complained of being that of the engineer himself, we can not say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company, as a part of the very transaction itself.”

To the same effect is the ruling in *Conlon v. Pitts-*

burg Railway Co., 223 Pa. 101. The declarations of the employees in charge of the operations of the trolley car were admissible because they fully meet the tests laid down by the law for their admission,—“They must be made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption that they are the result of premeditation or design.” The motorman and conductor were operating the colliding car; they stepped from it; saw the effect of the collision and at once made the declarations without any inquiry addressed to them intimating negligence on their part.

These conditions are entirely at variance with the facts found in the case of *McCullough v. Phila. Rapid Transit Co.*, 16 Dist. Rep. 513, cited by counsel for the defendant, where the injured party asked the motorman for his explanation of the accident. In *Coll v. Easton Transit Co.*, 180 Pa. 618, the motorman assisted in carrying the injured person to a railroad station one and one-half blocks from the place of the accident. He then explained how he came to run over the body of the deceased. This was two minutes after the occurrence and not at the point where the injury was inflicted. The Court held that the declarations were admissible.

The only specific reason for a new trial relates to the admission of the declarations of the motorman and the conductor.

The application for a new trial is refused.

From what we have said in relating the occurrences as given by the plaintiff's witnesses and the circumstances surrounding the accident, we are convinced, that the case was for the jury to determine whether the defendant's car caused the accident through negligence because those in charge of the car did not operate the same with reasonable care under the circumstances and did not have the car under proper control. Whether the plaintiff was guilty of contributory negligence was also for the jury.

The motion for judgment, in favor of the defendant, non obstante veredicto is overruled.

HELLER v. MOCK.

Waters—Riparian Owner—Prescription.

The plaintiff, establishing the continued use of a portion of the water from a spring on his land for irrigating his meadow at certain seasons of the year, quietly and uninterruptedly for sixty years or upwards, acquired a prescriptive right to the use of a portion of the water of the spring for irrigating his meadow, and also the right to locate a dam not exceeding eight inches in height across the channel of the overflow.

In the Court of Common Pleas of Lehigh County.
Sitting in Equity. No. 1 April Term, 1917. Frank B.
Heller v. John W. Mock. Bill in Equity.

Thomas F. Diefenderfer, for Plaintiff.
Francis G. Lewis, for Defendant.

Groman, P. J., March 4, 1918.

FINDINGS OF FACT.

1. The plaintiff is the owner of a tract of land as set forth in the first paragraph of the bill.
2. On said tract of land is a spring as set forth in the second paragraph of the bill.
3. The water from said spring was used by plaintiff and his predecessor in title as set forth in the third paragraph of the bill.
4. For a period of sixty years and upwards the water from said spring flowed through a channel to plaintiff's meadow for irrigating purposes, without interference or interruption until the date of the acts complained of in the bill.
5. John W. Mock, the defendant, is the owner of a tract of land as set forth in the fifth paragraph of the bill.
6. The plaintiff and his predecessors in title had uninterruptedly and undisputedly for a period of sixty years and upwards diverted the water from said spring for the purpose of irrigating the meadow by placing a small dam in the channel, and so the said water before and during the time defendant owned and lived upon the premises described in the fifth paragraph of the bill. The defendant on several occasions tore out the dam, thereby diverting the water from plaintiff's meadow, and further threatening to continue to tear out the dam as often as rebuilt.

7. Defendant in his manner admits the right of the plaintiff to use some of the water from the spring for irrigating the meadow, and for which purpose it was necessary to construct a small dam, eight inches high, in the channel of the stream, to raise the water sufficiently for irrigating purposes.

8. For a period of sixty years and upwards, the plaintiff and his predecessors in title erected a dam in the channel of the stream, and diverted a portion of the water to the meadow whenever considered necessary for irrigating purposes only.

9. The defendant tore out the dam so placed in the channel by the plaintiff before the dam filled sufficiently to overflow the meadow; and in one instance defendant admits he did so before its completion.

10. There is no evidence in the cause showing that the dams erected by plaintiff and torn out by defendant were higher than the dams erected during a period of sixty years and upwards; the dams erected being from six to eight inches in height.

DISCUSSION.

The question involved is: What are the respective rights of the parties to the use of the water flowing from the spring? The evidence shows the construction of a dam and a diversion of a portion of the water to plaintiff's meadow covering a period of upwards of sixty years, in fact, the right of the plaintiff to use a portion of the water for such purpose is admitted by the defendant in his answer. The rule applicable to the use of water where the right to such use has been acquired by prescription, as we find it in the matter now before us, is stated in *Messinger's Appeal*, 109 Pa. St., Page 288 as follows: "It is a well recognized rule that a riparian proprietor may, *jure naturae*, divert water from a stream for domestic purposes, and for the irrigation of his land; but to what extent he may do the latter in any particular case, depends on whether it is reasonable, having due regard to the condition and circumstances of other proprietors on the stream; he should not so divert it as to destroy or materially diminish or impair the application of the water by other proprietors: *Washb. on Easements*, 240; *Miner v. Gilmour*, 12 Moore, P. C., 155; *Elliott v.*

Fitchburg R. R. Co., 10 Cush., 191; Embrey v. Owen, 6 Exch., 353."

The defendant contends that he acquired the right to use the water flowing into the watering trough for watering cattle and for cooling milk by prescription; we cannot so find from the evidence submitted. The watering trough was erected along the public highway on lands other than that of defendant by the owner thereof; the supervisors of the township annually paid five dollars to the owner for the care and maintenance of such trough, under the provisions of an Act of Assembly. And even if acquired by prescription, such right would be subject to the prior right then already acquired by the plaintiff to use a portion of the water from said spring for irrigating purposes. The evidence shows that the height of the dam placed in the channel of the overflow at no time exceeded eight inches. The evidence fails to show that so much of the overflow of the spring used by plaintiff for irrigating purposes, was an unreasonable use thereof under the conditions and circumstances then existing.

CONCLUSIONS OF LAW.

1. The plaintiff established the continued use of a portion of the water from the spring for irrigating his meadow at certain seasons of the year, quietly and uninterruptedly for sixty years and upwards.

2. The plaintiff acquired a prescriptive right to the use of a portion of the water of the spring for irrigating his meadow, and also the right to locate a dam not exceeding eight inches in height across the channel of the overflow.

3. The destruction by the defendant of the dam erected was unlawful, as it interfered with the enjoyment of the rights of the plaintiff.

4. The evidence fails to show that the use of a portion of the water of the spring for irrigating purposes was an unreasonable use under the conditions and circumstances then existing.

5. Frank B. Heller, the plaintiff, is entitled to the decree prayed for in the bill.

Now March 4, 1918, solicitor for plaintiff is directed to draw and submit the proper decree.

NATIONAL SURETY CO. v. LASTER.

Waiver of Jury Trial—Amendment—Laches—Evidence.

On waiver of jury trial, after the Court has found the facts and conclusions of law, and directed judgment to be entered unless exceptions were duly filed, the Court refused to allow an amendment of the plaintiff's statement.

The Court cannot construe a contract unless the pleadings or proofs show in what state it was entered into.

In the Court of Common Pleas of Lehigh County. No. 136 April Term, 1916. National Surety Company v. Hyman L. Laster. Assumpsit. Waiver of Jury Trial. Exceptions to Findings of Fact and Conclusions of Law.

Aubrey & Steckel, for Plaintiff.

Dallas Dillinger, Jr., for Defendant.

Groman, P. J., February 18, 1918. The plaintiff on July 22nd, 1915, entered into a recognizance conditioned for the appearance of one Nathan Neuman in the County of Richmond, State of New York, to answer a charge of bigamy, upon an indictment founded November 18th, 1912. The defendant herein at the same time entered into an agreement to indemnify and keep indemnified the plaintiff, and save it harmless from all demands, liabilities, damage or expense whatever plaintiff might sustain or suffer by reason of any default. Neuman failed to appear to answer the charge; the plaintiff company became liable and paid the recognizance to the proper authorities of the County of Richmond, State of New York. Plaintiff now seeks to recover from defendant on said agreement. At the time the cause was reached for trial, counsel waived a jury trial, offered no testimony, and submitted the case on the pleadings. After argument in December, 1916, the court on February 19th, 1917, made the following order: "An examination of the declaration fails to disclose the jurisdiction wherein the agreement of suretyship involved in this suit was entered into. Was it in Pennsylvania or New York, or some other state? This may be a serious matter. The prothonotary is hereby directed to place this matter on the argument list for re-argument, and so notify counsel interested."

The matter was then re-argued; the court found facts and conclusions of law as required, and May 17, 1917,

filed the same and directed the entry of a judgment in favor of the defendant unless exceptions thereto were filed in the prothonotary's office within thirty days thereafter. Exceptions were filed, and also a motion for leave to amend the statement of cause of action by adding thereto an averment showing where the agreement in question was entered into. We then are now asked to allow an amendment. The findings of fact, conclusions of law and judgment thereon are equivalent to the verdict of a jury. Should the court allow an amendment of a statement after verdict rendered? Amendments may be asked for at any time before the trial, and the allowance thereof is within the discretion of the Court. The attention of the court has not been called to any authority where an amendment was allowed after verdict rendered. The situation of present counsel of plaintiff is not of his making; but we are not inclined to allow the amendment.

In disposing of the exceptions we must not lose sight of the fact that the case was submitted without testimony, and on the record of the pleadings only; oral motions and statements in the very nature of things do not and cannot become a part of the record. All motions must be reduced to writing, and then we will dispose of the same in proper order. If oral motions were recognized by the court as a part of the pleadings, the administration of justice would become vague and uncertain, a very bedlam of confusion.

The same question still confronts us: In what state was the agreement of suretyship entered into? This question is vital in determining the construction to be placed upon the agreement in suit; the agreement is to be construed in accordance with the law of the state wherein it was executed. The matter was submitted upon the whole record; we can nowhere find from the record in what state the agreement was entered into so as to determine what construction to be placed upon it, and, therefore, must decline to assume that which the pleadings fail to show.

Now February 18, 1918, exceptions dismissed.

KIDD v. FRACK.

Justice of the Peace—Jurisdiction.

Where defendant hired a horse from the plaintiff, and in a careless and negligent manner tied the horse in a shed, so that the horse, during the absence of the defendant, became entangled in the hitching rope, was thrown, and so injured that it died, a justice of the peace has no jurisdiction, when damages are sought to be recovered for the value of the horse, for the expenses incurred by the plaintiff, and for services rendered in taking care of the horse after the accident.

Want of jurisdiction raised in Common Pleas on trial of case on appeal.

In the Court of Common Pleas of Lehigh County. No. 133 October Term, 1916. Edward Kidd v. Louis Frack. Appeal from Justice of the Peace. Rule for New Trial.

William H. Schneller and Thomas F. Diefenderfer, for Plaintiff.

Richard W. Iobst, for Defendant.

Groman, P. J., February 18, 1918. The above case came to the Common Pleas on appeal from the judgment of a justice of the peace. Defendant moved to enter a non suit on the ground that the justice had no jurisdiction; the motion was overruled; a verdict for the plaintiff was rendered. A rule to show cause why a new trial should not be granted was allowed; defendant rests his reasons for a new trial on want of jurisdiction by the justice of the peace.

The suit before the justice of the peace was brought in trover and conversion; the proof submitted in the Court of Common Pleas seems to indicate that plaintiff seeks to recover damages from the following cause of action: Defendant hired a horse from the plaintiff; that defendant in a careless and negligent manner tied the horse in a shed; that the horse, during the absence of the defendant, became entangled in the hitching rope, threw itself, and was injured so badly that within a few weeks thereafter it died. Damages were sought to be recovered for the value of the horse, for the expense incurred by the plaintiff and for services rendered in taking care of the horse after the accident.

The form of the action before the justice and upon appeal may not be so material, as the form may be changed or an amendment allowed provided the cause of

action is not changed; Scheirer v. Gross, 117 April Term, 1917, C. P. Lehigh County, where a number of authorities are cited from Esher v. Flagler, 17 S. & R., Page 141 to Weiler v. Kershner, 109 Pa. St., Page 219, besides a line of cases from Graham v. Vandalore, 14 Watts, Page 131 to Seitz & Co., v. Buffum, 14 Pa. St., Page 69.

But had the justice jurisdiction? The following line of cases throw some light on that question: Judge Rice in Grosky v. Wright, 2 Kulp, 415, used the following language: "A justice has jurisdiction of actions of trespass brought for the recovery of damage done or committed on real or personal estate. It has been many times decided that the damages for which plaintiff may sue in this form of action are such as arise where the injury is immediate and would be recoverable in the common law action of trespass vi et armis, and not such as are consequential and would be recoverable if at all only in an action of trespass on the case."

In O'Connor v. Frysinger, 23 Lanc. Law Rev. 189, the court followed the same ruling. Other cases might be cited: Rodenbaugh v. Bernice, 3 Northampton, Page 73; Sisco v. Miller, 2 Lack. L. N. 143.

It has been held that in an action to recover damages involving negligence where the same cannot be liquidated, the question of damages must be submitted to the jury, and that then the justice had no jurisdiction: Thilow v. Phila. Trac. Co., 4 Dist. Reps. 83; to give a justice jurisdiction, the trespass must be committed by the defendant himself in person even though the damages are capable of liquidation, is the conclusion we reach upon an examination of a number of authorities. We conclude the damages sought to be recovered were consequential, the justice, therefore, had no jurisdiction.

Now February 18, 1918, the verdict is set aside, and the rule for a new trial made absolute.

FRANTZ v. CAMBRIDGE SLATE CO. ET AL.

Workmen's Compensation—Act of June 2, 1915, P. L. 736, Sec. 309.

When a workman, when injured, is regularly employed for five days at a daily wage agreed upon, the compensation will be reckoned according to section 309 of the Act of June 2, 1915, P. L. 736, even though in prior employments he received a higher rate of wages.

In the Court of Common Pleas of Lehigh County. No. 1 October Term, 1917, Workmen's Compensation Docket. Fietta Frantz v. Cambridge Slate Co., defendant, and Ocean Accident and Guaranty Company, Insurance Carrier.

Thomas F. Diefenderfer, for Claimant.
Aubrey & Steckel, for Defendants.

Groman, P. J., March 4, 1918. Frank R. Frantz, the husband of plaintiff herein, on September 28, 1916, met with an accident and sustained injuries which resulted in his death the same day. He had been employed by an agent for the defendant company five days before the accident occurred, and had been hired as a helper at the rate of two dollars per day. He had previously been employed by other slate men as foreman and in other capacities at a higher rate of compensation. The referee fixed the compensation on the basis of the average weekly earnings of the decedent for one year prior to decedent's death, including in the year a period of time wherein he was employed by other companies in the capacity of foreman. From the award the insurance carrier appealed on the ground that there was a contract for wages at the time of the accident, and that, therefore, the compensation should be fixed under Section 309 of the Workmen's Compensation Act of 1915. The Board upon appeal sustained the exceptions filed, dismissed the appeal, modified the findings of fact and conclusions of law, and modified the award of the referee to conform with the amended findings of fact. The plaintiff appealed to the Court of Common Pleas of Lehigh County, and upon certiorari to the Workmen's Compensation Board, and thus the matter finally reached this court.

The exceptions raise the following question of law: Was the board in error in holding that the compensation to be awarded to the plaintiff was to be determined by Article 3, Section 309 of the Compensation Act of 1915? The provision relative to wages reads as follows: "Whenever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." It appears "wages"

then is the money rate at which the service is rendered and to be paid for by the contract of hiring entered into by the employer and the employee, before the accident, and in force when the accident occurred. In this matter we find the rate of wages was fixed by agreement at the rate of two dollars per day, and to that extent the parties came within the above provisions of the act. Section 309 further provides that "In continuous employment, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and a half times his average earnings at such rate for a working day of ordinary length, excluding earnings from overtime, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer." The employment was a continuous employment before the accident occurred for five days only, but it was a continuous employment for that period of time, so found by the board, at the rate of two dollars per day. Findings of fact by the board are final and cannot be disturbed by the court: *Poluskiewioz v. Philadelphia and Reading Coal and Iron Co.*, 257 Pa. St., Page 305 (1917). We thus have an agreement as to the rate of wages to be paid, and a continuous employment prior to and at the time of the accident. What then are the provisions of the act relative to the compensation to be allowed? Part of Section 309 reads as follows: "In continuous employment, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day of ordinary length, excluding earnings from overtime, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer." The compensation to be allowed is to be fixed and determined by the provisions of that part of the Act of 1915 just quoted. The board found that he worked for the same employer for the period of five days before the accident occurred at the rate of two dollars per day agreed upon by the employer and employee, and fixed compensation according to said provision of the act. We cannot say the board was in error in awarding compensation as provided for

by Article 3, Section 309 of the Compensation Act of 1915.

Now March 4, 1918, appeal dismissed and award of Compensation Board affirmed.

BERGER-GLOSE CO. v. HAINES ET AL.

Mechanics' Lien—Sub-contractor—Notice—"Nature of Labor or Materials Furnished."

Under Section 8 of the Act of June 4, 1901, P. L. 431, as amended by the Act of March 24, 1909, P. L. 65, a statement in the notice by the sub-contractor of his intention to file a lien, that the "nature of the materials furnished" was "hardware and glass," is too indefinite; and where a copy of the notice is attached to the lien filed, the lien will be stricken off on motion.

In the Court of Common Pleas of Lehigh County. No. 23 April Term, 1916, M. L. D. Amandus D. Berger, et al., partners trading as Berger-Glose Company, v. George F. Haines and Thomas J. Creitz. *Mechanics' lien. Rule to strike off lien. Rule absolute.*

Calvin E. Arner, for Claimant.

Thomas F. Diefenderfer, for Geo. F. Haines, owner.

Groman, P. J., March 4, 1918. A petition to show cause why the Mechanics' Lien filed in this proceeding should not be stricken off, was presented July 5, 1916, and a rule granted. On April 2, 1917, an opinion was filed wherein the basis of a possible settlement was suggested. We there stated that where a claim contains only one good item which is the subject of a lien, it should not be stricken off even though all the other items were insufficient: *McCristal v. Codhran*, 147 Pa. St., Page 225; *Mercer Milling and Lumber Co. v. Kreaps*, 18 Pa. Sup. Ct., Page 1.

The question involved herein is the sufficiency of the notice of intention to file a lien. The notice attached to the lien reads as follows: "3.—The nature of the material furnished was hardware and glass." Was this then "a description of the quality of the things furnished so that they could be distinguished and identified?" The notice of intention to file a lien served on the owner had not attached to it an itemized statement giving the owner an

account of the various items furnished, prices to be paid and kind of materials; if this had been done in connection with the notice served, claimants would undoubtedly be within the rule laid down in Willson, Appellant, v. Canevin, 226 Pa. St., Page 363 and 366. We, however, will have to dispose of this matter upon the record before us. In A. G. Breitweiser Lumber Company, Appellant, v. Wyss-Thalman, 51 Pa. Sup. Ct., Page 83 (1912), the notice of intention to file a lien stated that the material was "rough lumber and mill work." The lower court in making the rule to strike off the mechanics' lien absolute, held that the term "rough lumber and mill work" was too general to sustain a lien; upon appeal, the lower court was sustained. In Benton, Appellant, v. Berg Distilling Co., 63 Pa. Sup. Ct., Page 412 (1916), the notice of intention to file a lien sets forth that claimant "furnished lumber used in the construction of the building." This was held insufficient to sustain the lien. Applying the rule thus established to the facts before us in this case, we reach the conclusion that the notice to file a mechanics' lien was insufficient to sustain the lien.

Now March 4, 1918, rule to strike off lien made absolute.

KIEFER v. SULKIN ET AL.

Fixtures—Vendor and Vendee—Preliminary Injunction.

The owner of a hotel property conveyed same without reservation of bar fixtures, counters, etc. Held, that as between vendor and vendee in the absence of any evidence of intention on the part of the vendor to retain the fixtures at the time of the conveyance, they passed to vendee.

Sur motion to continue preliminary injunction. In the Court of Common Pleas of Northampton County, Sitting in Equity, No. 4 April Term, 1918.

Smith, Paff & Laub, for Plaintiff.

E. J. Fox & J. W. Fox and Parke H. Davis, for Defendants.

The opinion of the court was filed April 8, 1918, by McKeen, J. A preliminary injunction was granted by the court on the twenty-first day of March, 1918, restrain-

ing Louis Sulkin and B. E. Jones, the defendants, from selling, removing or otherwise disposing of the bar, back bar, office counter, cigar counter, mirrors, fixtures, appurtenances and improvements contained in certain real estate known as the Sterling hotel, situated on the south side of Northampton St., between Fourth and Fifth Sts., in the city of Easton, Pa. At the hearing held on the twenty-seventh day of March, 1918, it developed that the hotel property was conveyed to complainant by Louis Sulkin, one of the defendants, and Rosie Sulkin, his wife, by deed dated the thirtieth day of January, 1918, and that at the time of the conveyance of said property, B. E. Jones, the other of said defendants, was the lessee of Louis Sulkin and all the right, title and interest of Louis Sulkin in the lease to said B. E. Jones was assigned unto complainant. No title to the fixtures was established in said B. E. Jones at the time of the hearing and, therefore, the only question that need be discussed is whether the said fixtures passed with the real estate at the time of the conveyance thereof by Louis Sulkin and wife unto complainant. Louis Sulkin was the owner of the fixtures in question and acquired them with the real estate at the time he purchased same from his predecessor in title. On the nineteenth day of December, 1917, Louis Sulkin entered into an agreement of sale for said premises with complainant which said agreement of sale was offered in evidence and made a part of the record, as well as the deed for said premises from Louis Sulkin and wife unto complainant. Neither the agreement of sale nor the deed contains any reservation of fixtures. It further appeared that the real estate agent who negotiated the sale for said premises informed the purchaser that the fixtures would go with the real estate although it does not appear that he had any specific authority from Louis Sulkin, except from inference, to make such statement to the purchaser. The son of complainant, however, testified that Louis Sulkin prior to the execution of the deed had told him that the fixtures went with the property. For the purposes of the case it is not necessary to comment how the fixtures were annexed to the premises as the criterion in Pennsylvania is the intention to annex. The presumption in favor of trade that a tenant who attaches fixtures to premises intends to remove them does not exist in the

case at bar as the transaction is between vendor and vendee and in such instances the rule in regard as to what shall be considered a part of the realty is much more strict than that which exists between landlord and tenant. There was no proof submitted at the hearing of the intention of the vendor to retain the fixtures in question at the time of the conveyance of the premises and unless expressly excepted by the terms of sale they pass to complainant.

And now, April 8, 1918, the injunction heretofore granted is continued until final hearing.

KLINE v. KLINE.

Divorce—Notice of Taking of Depositions.

The service of notice to take depositions in a divorce proceeding or the service of a rule to show cause why a divorce should not be granted, as provided for by the rules of court, rises no higher in its requirements than the requirements of the act relative to the service of the subpoena in divorce—personal notice within the county.

In the Court of Common Pleas of Lehigh County. No. 54 October Term, 1917. Mamie E. Kline v. W. Russell Kline. In Divorce. Master's Report.

Francis J. Gildner, for Libellant.

Groman, P. J., December 31, 1917. In the above proceeding, the Master in his report states that the testimony submitted would justify a decree in divorce, that he would so recommend but for the fact that personal notice of the time and place of taking the testimony was not given to the respondent, a resident of Altoona, Pennsylvania, the respondent not being a resident of Lehigh County. The service of notice to take depositions in a divorce proceeding or the service of a rule to show cause why a divorce should not be granted as provided for by the rules of court, rises no higher in its requirements than the requirements of the act relative to the service of the subpoena in divorce—personal notice within the county.

The rules of court fix the master's fee at twenty-five dollars and ten dollars additional for each meeting after

the first; the record fails to show that the master had more than one meeting. To entitle him to an additional allowance, the report should show that he is within the requirements of the rule. Failure to so show, preclude the court from making the order requested by the master.

Now December 31, 1917, the report of the master is referred back to the prothonotary's office; the prothonotary is directed to issue a rule upon the respondent as required by Section 14 of our rules of court.

HENNINGER v. HENNINGER.

Divorce—Amendment—Date of Marriage.

A master and examiner has no authority to amend a libel in divorce.

Where the respondent was served personally, and was present at the taking of the depositions, a divorce will not be refused because of a variance in the allegation and proof as to the date of the marriage.

In the Court of Common Pleas of Lehigh County. No. 29 April Term, 1917. Leonard Henninger v. Anna Henninger. In Divorce. Master's Report.

Dallas Dillinger, Jr., for Libellant.

Groman, P. J., February 18, 1918. The record herein shows that a pluries subpoena in divorce was served upon respondent; that at a hearing fixed by the master and examiner to take testimony, the respondent was personally present; that while such hearing was in progress, counsel for libellant moved to amend the libel so as to show that libellant and respondent were married on the 30th day of June, 1907, instead of 1908. The amendment was allowed by the master. The proof submitted would warrant the granting of a decree, but the court cannot allow such a proceeding to pass unchallenged for the reason that no amendment to a libel can be allowed by a master and examiner; the duties of a master are entirely governed, regulated and controlled by the order of his appointment. This is so evident that no citation of authorities is required.

Should a decree in divorce be refused for the above reason only? As before stated, personal service was had, the respondent was present at the hearing. If the amend-

ment allowed would change the causes of divorce set forth in the libel, the decree would have to be refused; this, however, is not the case. The marriage itself was alleged in the libel; the date only was changed by the proof; such change in no manner changed the situation of the parties or the causes set forth in the libel. The court will strike off the amendment of the libel allowed by the master and treat it as surplusage for the reasons hereinbefore set forth.

Now February 18, 1918, decree in divorce granted.

PITTSBURGH PROVISION AND PACKING CO. v.
WHITE ROCK SUPPLY CO.

Fixtures—Store—Part of Plant—Receiver's Sale—Burden of Proof.

In determining the ownership of fixtures, "physical attachment" is not decisive. "Intention" is the controlling factor. Where the lease is silent this "intention" is to be gathered from all the facts and circumstances of the particular case.

Where a building was erected for use as a general store and the several fixtures were put into the building for the purpose of completing the structure as a store and were used as a part of what may be termed a "plant," it was held that they would pass to the purchaser at a receiver's sale.

Case stated. In Equity. Common Pleas of Allegheny County, January Term, 1914, No. 1862.

James F. Burke, for Plaintiff.
Stone & Stone, for Defendant.

March 5, 1918. Opinion by Carpenter, J. Under date of September 24, 1917, D. B. Taylor, D. R. Tomb and Ernest Stewart, a committee of and for the holders of the First Mortgage Bonds of the White Rock Supply Company, filed their petition for an order restraining John W. Ailes, E. R. Babcock and John H. Jones, receivers of said Supply Company from selling, disposing of, severing or taking away, shelving, counters, showcases, refrigerator and other fixtures belonging to the Mariana Store which said committee for bondholders claimed as purchasers of said store. The right and title of the purchasers was disputed by the receivers. Under date

December 20, 1917, counsel filed a statement of facts which presents the question now before the court. It was agreed that this statement should have the same force and effect as if the facts were established by testimony. Upon the facts thus presented the court is requested to determine whether certain property specified, and its physical relation to the store and premises sold to the committee described, in a schedule attached to said statement, passed to said purchasing committee as part of the freehold.

From the statement it appears that the White Rock Supply Company purchased a lot in West Bethlehem Township, Washington County, in October, 1909, and thereafter erected thereon a large brick store building which is equipped with necessary fixtures or appliances for carrying on business, and in which it subsequently conducted business until the receivers were appointed.

Pursuant to order of Court, dated May 16, 1916, the receivers sold and conveyed this and other properties, described in the petition for leave to sell, to a committee representing certain creditors of the Supply Company, known and designated herein as the Bondholders' Committee. Among the properties so sold was the lot and store building above mentioned, "also all the other real and personal property, rights, privileges, franchises and good will of the White Rock Supply Company, then owned and possessed by it." The Bondholders' Committee has been in possession of this store building since about the first day of May, 1917.

Counsel do not differ respecting the general rules by which the question of title to what are commonly known as "fixtures" is to be determined. It may now be regarded as settled that the fact of "physical attachment" is not decisive. "Intention is the controlling factor. If a lease is silent the intention is to be gathered from all the facts and circumstances; the conduct of the parties, the purpose of the fixtures, the means by which they are attached, the effect their removal will have on the building, etc. If a deed conveying the premises is silent, the title to the articles ordinarily designated "fixtures" is based on "presumption" rather than "intention." The reasons for this distinction are obvious. A tenant desires, or may find it necessary, to put in what are known as

"trade fixtures" for the more efficient conduct of his business, or, because he desires to improve the facilities for lighting the premises for his own use or comfort, he affixes the necessary appliances. His right to occupy the premises is limited to a year, or, at most, a term of years. In such case, mere physical attachment to the land or building does not make the thing attached part of the freehold. But when an owner erects a building for business purposes and builds into, or attaches to it, things deemed essential to its efficient use in carrying on the business for which it is designated and is subsequently used, such attachments or additions constitute part of the structure. The physical facts negative any "intention" to the contrary. In this case there is no evidence of any declared intention, hence we must base our conclusions upon the facts disclosed.

The language quoted from the deed is comprehensive and, standing alone, might well be construed a sale of the several articles enumerated in the schedule attached to the statement.

In view of the fact that the building was erected for use as a general store and the several articles were put into the building for the purpose of completing the structure as a store and were used as part of what may be termed the "plant," the burden of showing that they were merely "removable fixtures" and did not pass to the purchaser, rests upon the seller. The facts having been agreed upon, the question of their legal effect, only, is before the Court.

As stated above, the conveyance executed pursuant to order of Court is sufficiently comprehensive to pass title to the so-called fixtures, and in the absence of any exception or reservation the purchaser had the right to assume that they passed with the building.

This is the controversy between the owner of the fee and a purchaser, and the law in relation to landlord and tenant is not applicable, at least, is not controlling. But even if we were to apply the familiar rule of "intention" it would not avail the receivers who, for the purposes of the case, were the owners, because the intention is ascertainable from the facts and the facts plainly disclose the purpose of the White Rock Supply Company to erect a complete plant, and that, as essential to completeness,

the several parts enumerated were put in place. It may be conceded that as to some of the items or groups the question of title is close, but in view of the language of the deed and the evident purpose in constructing and equipping the store building, the judges who have considered the question are of opinion that the title to the articles enumerated in the schedule passed to the purchasers at the receivers' sale.



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1. A widow is entitled to her exemption, though not living with her husband, if her absence was occasioned by indignities to her person so that her condition was intolerable and life burdensome, 26.

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3. An executor was permitted to enter a note more than ten years old where the answer of the maker's defense as to extinguishment was not clear, 41.

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DOWER.

1. Proceeds of writ for the collection of a dower will be applied to the payment of first dower, when there are two dowers upon the premises, but not to the payment of the interest thereon, and the balance to the second dower, the interest of the heirs in the second dower cannot be diminished by the payment of interest on the first, 122.

EQUITY.

1. The proof of fraud must be direct, or at least clearly established and will not be presumed in a bill which charged that the transfer of assets was for purpose of delaying and defrauding creditors, 18.

2. A demurrer to a bill for injunction was dismissed where it was alleged that a garage which was about to be erected would interfere with divine services, the safe and quiet use of the neighborhood, for if fully proven would entitle plaintiffs to equitable relief, because of the inadequacy of an action at law for such injuries, 300.

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2. Real owner of a chattel cannot be charged with an estoppel by the purchase at a sheriff's sale where it does not appear that purchaser acted on or was misled by anything said or omitted by owner or his agent, and the party setting up an estoppel must be personally misled by acts which constitute the estoppel alleged, 250.

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1. A paid up policy is not payable to creditors of a bankrupt when the beneficiary is the wife of the bankrupt, 132.

2. An insurance company was discharged, under a policy which provides that payment may be made to executor, husband, wife, any relative of blood or lawful beneficiary, when a receipt was taken from the widow and the policy surrendered, 229.

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1. Where widow was given life estate but there was a partial intestacy after her death in certain personal property, it was held that she might claim this under the Act of 1909 in addition to her life estate under the will, 370.

2. Real estate of intestate went to posthumous son, upon the latter's death to his mother for life and then to the brothers and sisters of intestate who were of the blood of the first purchaser, 21.

JUDGMENTS.

1. An executor will be allowed to enter a judgment note in favor of testator where the answer of maker sets up a contemporaneous agreement upon which he claims note is extinguished, 41.

JUSTICE OF THE PEACE.

1. A justice of the peace has jurisdiction for damages to an automobile, the damages being immediate, 11.

2. Alderman has no jurisdiction to impose fine upon the appearance of defendant's wife who pleads guilty, and upon certiorari restitution will be ordered, 31.

3. Upon certiorari held justice had no power to impose sentence of imprisonment under Cruelty to Animals Act of 29 March 1869, only in default of payment of fine could he be detained, 39.

4. When a justice of the peace has jurisdiction of the parties and subject matter, the judgment cannot be attached collaterally in another proceeding when an appeal was not taken to have the judgment reversed or vacated, 242.

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1. Contributory negligence can be declared by the court in clear cases only, and it is not negligence per se for passengers awaiting the departure of trains to do so at the appropriate gate in a station instead of remaining in the waiting room, 109.

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6. The measure of damages in an automobile injury is expenses to which plaintiff was put in hiring another automobile while his car was being repaired, the cost of the new parts and repairs and depreciation, 367.

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7. A court may under the Act of 1911 allow an exception to the charge of the court after verdict, the exception to be entered as in the case of exceptions generally, 364.

8. On a motion for a new trial court will not consider the argument that there was error in the charge of the court, unless counsel who makes motion furnishes the court with a transcript of the record as taken at the trial, 367.

9. After a jury trial is waived and the court has found the facts and conclusions of law and directed judgment to be entered unless exceptions are duly filed, court will not allow an amendment to the plaintiff's statement, 405.

REAL PROPERTY.

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2. Where a real estate broker opens negotiations with a prospective buyer, the owner cannot annul the negotiations, sell the property and refuse to pay commissions, 243.

3. The purchaser of land is put upon inquiry by actual conditions upon the land so that a telegraph company may enter land and erect additional poles under an agreement with a predecessor in title of the purchaser, 281.

REGISTER OF WILLS.

1. The Register of Wills has jurisdiction over letters issued improvidently and an error in the name of the decedent may be corrected by him, 334.

REPLEVIN.

1. In a suit of replevin by bailor of property sold at Sheriff sale, the bailor may recover even though without notice the transferee paid full value therefor, 250.

2. In an action in replevin upon an instrument in which the words "seller and buyer" were used instead of "lessor and lessee" and "rent" was equivalent to "liquidated damages" the transaction was held to be a conditional sale and not a bailment and the affidavit of defense by a bona fide purchaser was sufficient, 308.

3. A fire engine purchased by a borough upon which payments were not made, may be replevied by the seller and it is no defense that ordinance was not advertised according to law under which the purchase was made; if a contract is void or is made through fraud or imposition the goods may be replevied, 339.

RIPARIAN OWNER.

1. A plaintiff who dammed a spring on his land for the purpose of irrigating his meadow, as had been done for sixty years and upward may continue to do so provided the height of the dam does not exceed eight inches, 402.

ROADS.

1. Roads in the system of State highways become maintainable by the Commonwealth only when taken over by the Highway Department and the expense of their care and maintenance assumed, 105.

2. The State Highway Commissioner cannot by mandamus be required by a court to take over a road in state highway system unless an abuse of discretion be shown, 105.

RULE IN SHELLY'S CASE. SEE WILLS.

SALES.

1. The business of a licensed restaurant is not within the scope of the Bulk Sales Act of 1905, 29.

2. In an instrument for sale of automobile words "lessor" and "lessee" were not used but parties designated as "seller" and "buyer" and word "rent" as equivalent to "liquidated" damages, it was held to be not a bailment but a conditional sale, 308.

SPECIFIC PERFORMANCE.

1. Under Act of 1834 and 1889 a bill for specific performance must show that decedent contracted in writing or that he authorized another to contract for him and that he received part of the purchase money, otherwise the petition will be dismissed, 362.

STATE HIGHWAYS. SEE ROADS.

STATUTES.

1. Punctuation may be looked upon as some indication of the meaning, though it is not a controlling part of an enactment, 364.

SUMMARY CONVICTION.

1. An appeal will be allowed where a doubtful legal question is involved as whether a borough may limit the time that a railroad crossing may be blocked, 215.

2. A summary conviction may be had under the Act of April 14, 1905, where notices were properly posted by the owners of the bed of a stream, 239.

SURETY.

1. The surrender of principal and his imprisonment when he has failed to comply with the condition of bond to present his petition for discharge as an insolvent and to press same, does not relieve the bond, 86.

2. Where no past or present claim accrued during the life of the sureties given by a trolley company to save a railroad company from damages at a grade crossing, upon the death of sureties upon petition of railroad company a new bond was required, 351.

TAXATION.

1. Where a tax lien was filed September 15, 1915, under Act of June 1901, which act had been repealed by March 21, 1913, the tax collector was allowed to claim taxes on a distribution of proceeds of Sheriff's sale for the reason that Act of 1917 restored Act of 1901, 319.

TENANCY BY ENTIRETIES.

1. A deposit in a bank by A payable to either A or his wife B, or to A and B, constitutes an estate by entireties and the legal ownership rests in the survivor, 328.

TRUSTS.

1. Negligence or misfeasance on the part of a trustee would not authorize a court in disturbing a charitable trust under a will and distribute funds among next of kin, 44.

2. Where no prohibition against sale of trust property by trustee and purchase of other for trust purposes, is not a diversion of the property from the purposes but a conversion so that it may be more usefully applied, 44.

3. Courts of Common Pleas under Act of 1828, P. L. 222, may appoint a trustee of a charitable trust without consent of the Attorney General, 44.

4. A received \$3136.41 as trustee, when he died had only \$2437.65 in bank. Held successor a trust company should not be relieved on the assumption that amount had been embezzled, should have proceeded against surety; extraordinary case is expected of a trust company, 303.

5. A trustee is entitled to as much compensation as it earned, the compensation should be in proportion to the labors, 303.

WILLS.

1. A conversion of an estate into cash followed by bequest to a grandchild of "one-fourth of the estate upon arrival at age of twenty-one," with a proviso that if he should die before arriving at the age of twenty-one, his share should be divided equally among the other children of the testatrix, creates a contingent legacy, 148.

2. In a bequest to A during his lifetime and thereafter to his surviving child or children, their heirs and assigns forever, the words are words of purchase and not of limitation and the rule in Shelly's Case does not apply, 150.

3. A devise to A with a proviso that if A should die before she is of age or without children as her heirs, then to the brothers and sisters of the testatrix, vests in A an estate in fee simple, 152.

4. A devise to children during their life time and the survivor of them and after the death of the survivor to grandchildren per stirpes creates a joint tenancy with right of survivorship and upon the death of a child the grandchild, a son of the deceased child, is not entitled to the share during life time of testator's other children, 357.

5. The legal sufficiency of a writing alleged to be a will constitutes a question of fact upon which an issue devisavit vel non may be awarded to be determined by a jury, 386.

WORKMEN'S COMPENSATION.

1. Where a dwelling house is being altered the owner is engaged in a business within the meaning of the Workmen's Compensation Law, 60.

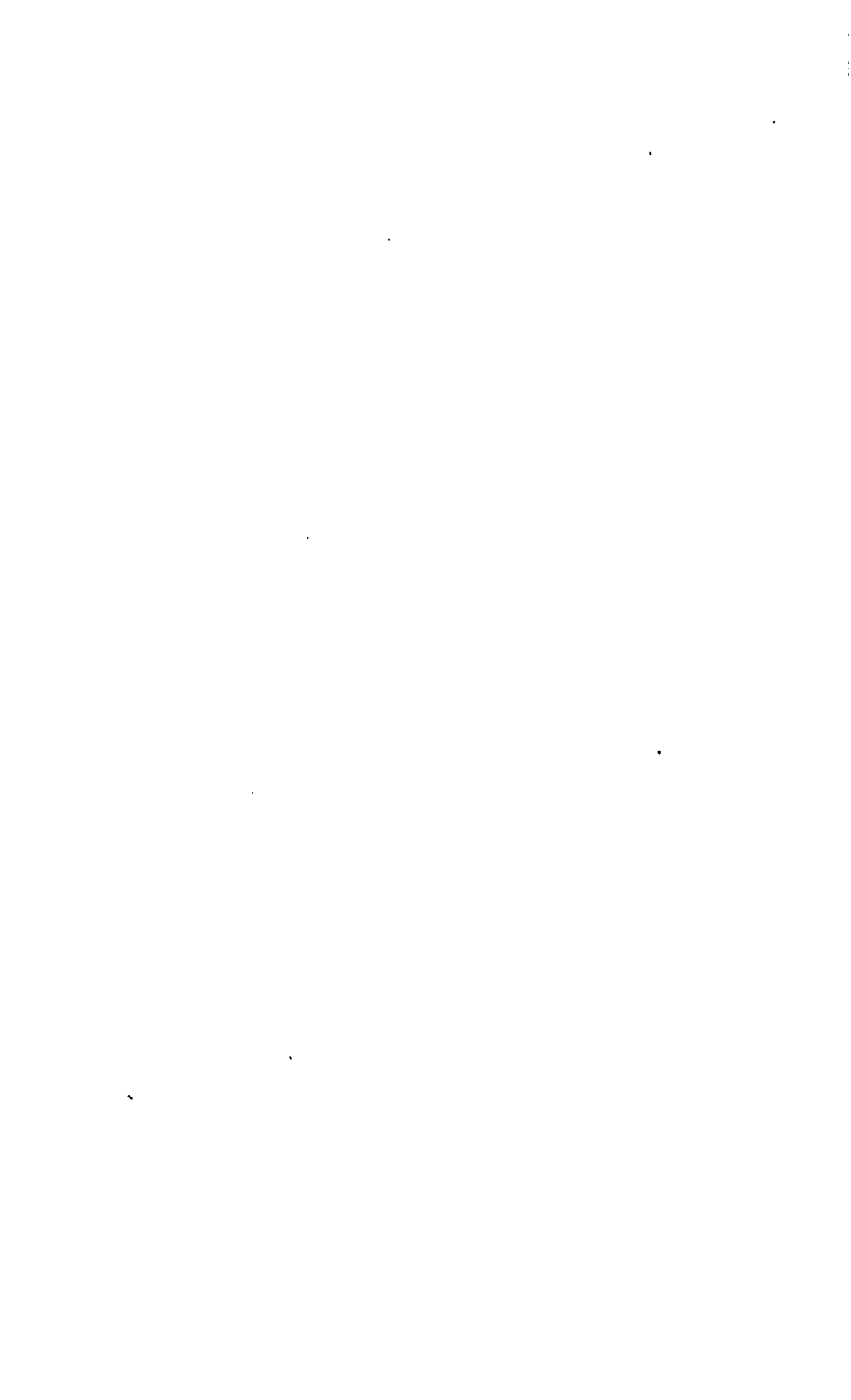
2. If employee engaged in alterations is not considered a casual employee but is engaged in the regular course of the employer's business, 60.

3. Pending the United States Supreme Court's decision on the question of whether employees in interstate commerce come within the Workmen's Compensation Act of Pennsylvania, all appeals from referees were placed upon a postponed calendar after stating reasons for such action, 71.

4. Burden of proof is on claimant and a case cannot be established by proof of an accident and subsequent death without showing that the death was the result of the accident, 101.

5. An employee who is injured while doing an act in furtherance of the business of his employer is entitled to compensation even though he is acting outside of the scope of his duties, 206.

6. When a deceased employee has been employed for five days at a daily wage, compensation will be reckoned on the basis of the amount received at the time of the death and not on the average weekly earning for a year prior to accident, 408.





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